INSTITUTE OF LAW RESEARCH AND REFORM

Edmonton, Alberta

REMEDIES OF UNSECURED CREDITORS

Report for Discussion No. 3

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INSTITUTE OF LAW RESEARCH AND REFORM

The Institute of Law Research and Reform was established January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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The Institute wishes to acknowledge the contribution of C.R.B. Dunlop, of the Faculty of Law, University of Alberta, who transferred to the Institute staff on a full-time basis for a two and one-half year period starting January 1, 1983. Professor Dunlop was the principal author of Research Report No. 16: The Operation of the Unsecured Creditors' Remedies System in Alberta (March, 1986), and was the draftsman of the Institute Report entitled Debt Collection Practices: Report No. 42 (June, 1984). He also prepared a draft of the present report for the Institute's Board, attended Board meetings and was the draftsman of this Report.

The Institute also wishes to acknowledge the advice and assistance of Mr. Iain D.C. Ramsay, counsel to the Institute from 1977 to 1981. Mr. Ramsay did a substantial amount of research on creditors' remedies during the early stages of the project. He prepared for the Board the Working Paper entitled Exemptions from Execution and Wage Garnishment (January, 1978), the research

paper called The Use, Effectiveness and Social Impact of Wage Garnishment: An Empirical Study (1980), and a set of reform proposals entitled Debt Recovery in Alberta: Proposals for Reform (1982).

Martin Romanow, who worked with the Institute in 1983 and 1984, assisted in the writing of chapter 4 of this report.

The Institute's Board has found this research helpful. However, the Board assumes sole responsibility for the opinions and recommendations contained in this report.

INVITATION TO COMMENT

This Report for Discussion sets out the Institute's tentative views for discussion and comment. The Institute will reconsider its views and prepare its final report and recommendations in light of comments received. The reader's attention is drawn to the list of questions contained in Chapter 7. It would be helpful if comments would refer to these questions where practicable, but commentators should feel free to address such questions as they see fit.

Comments should be in the Institute's hands by October 31, 1986. If more time is needed, please advise before October 15, 1986. Comments in writing are preferred. Oral comments may be made to C.R.B. Dunlop, Faculty of Law, University of Alberta. His telephone number is (403) 432-5582.

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N.S. Rules	Nova Scotia, Civil Procedure Rules.

PART I. SUMMARY OF REPORT

Purpose of Report

The purpose of this report is to examine the remedies available under Alberta law to unsecured creditors for collection of their debts, and to make tentative proposals for the reform of those remedies. In January, 1982, the Institute decided to embark on a general study of unsecured creditors' remedies. In June, 1984, we published Report No. 42: Debt Collection Practices which dealt with extra-judicial collections and recommended changes to the Collection Practices Act. We now turn to the remedies offered by the legal system where extra-judicial collection methods fail and the creditor finds it necessary to sue the debtor.

Description of Present System

In chapter 2, we describe the remedies available to a person who can obtain a money judgment against another in the Court of Queen's Bench or the Provincial Court of Alberta. Our primary focus is on legal rules and structures, but we also summarize the results of two empirical studies conducted by the Institute into the use of remedies in the period from 1978 to 1983. The second of these studies, by Professor C.R.B. Dunlop, was published by the Institute in March, 1986 under the title The Operation of the Unsecured Creditors' Remedies System in Alberta.

The Need for Technical Reform

Even accepting the present policy orientation of Alberta creditors' remedies law, we conclude in chapter 3 that our remedial system needs a thorough technical overhaul. The present law of creditors' remedies is a hodge-podge of English common law and equitable rules, English and Canadian statutes, together with judicial decisions which try to make sense of it all. The result is a confused collection of rules which can, in part, be understood only in the light of their history. A further complicating factor is that the area of enforcement of judgments is not a discrete part of the legal system; it involves constitutional and administrative problems as well as commercial, contract and property law. Another difficulty is that a considerable gap exists between the rules in the books and the rules as they actually work in the offices of sheriffs, clerks of the courts, land titles registrars and even chambers court judges.

The messy, incoherent nature of Alberta creditors' remedies law can be illustrated in a variety of ways. The specific situations we discuss in chapter 3 are not the only or even the best examples; others could have been chosen. Our purpose is not to question the fundamental approach of Alberta creditors' remedies; that task is reserved to chapters 4 and 5. Our objective is simply to show that, assuming the policy goals of Alberta creditors' remedies law to be acceptable, the technical implementation of those goals is in our view seriously flawed.

Debtors and Creditors: Images and Reality

In chapter 4, we examine the large body of research on the kinds of debtors who are likely to get into legal trouble, as well as the creditors who make use of the legal system. We then compare the empirical research on debtors with the common images of them as scoundrels, inadequate people or victims. The purpose of our discussion is to come to a realistic assessment of the phenomenon of debtor default before embarking on reform proposals.

Our review of the empirical literature leads us to the conclusion that most cases of debtor default result from some degree of inability to pay, amounting to "diminished payment capacity but not total incapacity." In the balance of the cases, default has arisen from an unwillingness to pay, sometimes justified (e.g., by creditor action) and sometimes not. In most cases, consumer debtors do not pay because, to a greater or lesser extent, they are unable to do so in the short run. Their current embarrassment may flow from a change in their situation not of their making (e.g., unemployment, injury) or from mismanagement, but the common result is a real inability to meet their obligations. Some debtors are chronically unable to solve their problems, even in the long run. A minority of debtors are capable of paying their debts but for a variety of reasons refuse or neglect to do so. The problem for law reformers is to devise a legal system which deals fairly with these various types of debtors, as well as the creditors to whom money is owing.

Fundamental Criticism of the Present Law

The Alberta system of creditors' remedies is similar in principle to those in place in England, Scotland, other Canadian provinces and, with modifications, the United States and Australia. It is therefore important to examine the large body of literature which has, over the past twenty years, developed fundamental criticisms of these systems and has proposed basic and radical reforms. These writers and law reformers have attacked the very roots of the remedial structure, instead of simply pointing out the technical ineptness of the law. We summarize their approach to law reform in chapter 5.

The critics of the present remedial system build on the relationship between debt and poverty. They find the law to be fundamentally unfair in its attempt to extract money from people who, by and large, are unable rather than unwilling to pay. They note that the creditors have greater knowledge, experience and power than the debtors and are better able to manipulate the remedial system which in any event caters to their needs rather than acting as a neutral arbiter between creditor and debtor. The present reliance of the remedial system on threats and coercion is unacceptable, particularly in light of the fact that most people do not pay because they cannot.

The legal system, it is argued, makes little or no effort to discriminate between debtors who cannot pay and debtors who have resources but who refuse to pay, either because of a perceived defence or for some other reason. Creditors often exercise poor judgment and pursue too many hopeless cases because of lack of information and bureaucratic rigidity. Debtors, because of ignorance and fear, fail to seek help or to invoke the protection of the Bankruptcy Act.

The critics of the present law have not hesitated to recommend major changes in the remedial system. Their basic proposals, given different emphasis by various writers, are as follows:

(1) compulsory mediation or arbitration of debt

disputes;

(2) state screening of debtors by a judicial or administrative agency in order to determine the appropriateness of specific remedies, or indeed whether the judgment should be enforced at all;

(3) limitation or abolition of creditor control over the choice of remedies and the frequency of their use;

(4) preference of some remedies (e.g., instalment orders, continuing wage garnishments) over others (e.g., seizure and sale of property); and

(5) state assistance for debtors.

The Institute's Approach to Reform

In chapter 6, we set out our tentative policy conclusions as to the reform of creditors' remedies law in Alberta. Our recommendations are summarized in chapter 7.

This is a report for discussion; our proposals are tentative and not the final views of the Institute. The recommendations are subject to modification in the light of feedback (which is urgently requested). On the basis of the comments and criticisms of the present report, we will issue a final report or reports with detailed proposals and draft legislation.

(1) The Need for an Effective System of Creditors' Remedies

We start from the belief, shared by almost all writers on the question, that the state should provide a reasonably effective system of collecting debts that are capable of being collected and that are not paid voluntarily. There are no doubt competing values, such as the preservation of those goods necessary to the survival of the debtor and the debtor's family. However the law would render meaningless the creditor's right to repayment if it did not provide a straightforward and adequate system of enforcement.

(2) An Integrated and Coherent Remedial System

In chapter 3, we note the technical incoherence and confusion of the present system. As a result, we urge that the Alberta law regarding the remedies of unsecured creditors should be completely rewritten into an integrated and coherent system of rules which will be, so far as possible, comprehensible by laypeople who must use the law as well as lawyers. To that end, we recommend that the various statutes relevant to unsecured creditors' remedies and the relevant parts of the Alberta Rules of Court should be gathered together into one new statute, which might be called the Enforcement of Money Claims Act. Purely procedural rules should be placed in the Alberta Rules of Court.

(3) One Enforcement System for all Courts

At present, Alberta has only one remedial system attached to the Court of Queen's Bench but used to enforce other judgments and orders, especially judgments of the Provincial Court. From time to time, it is suggested that courts like the Provincial

Court should be given their own separate remedial structure, thus bringing them into line with jurisdictions like Ontario. Our tentative conclusion is that, as to judgments obtained under Part 4 ("Small Claims Matters") of the Provincial Court Act, that Court should have no independent enforcement system.

(4) Imprisonment an Inappropriate Remedy

The history of English and Canadian creditors' remedies law is, in large part, a movement away from imprisonment of the debtor towards remedies against the debtor's property. In chapter 2, we came to the general conclusion that imprisonment for debt, whether based on statute or on the common law, has been abolished in Alberta, at least as a remedy for trade creditors. In our view, the present policy prohibiting imprisonment for debt as a remedy to enforce money judgments is sound and should be continued.

(5) Assets and Income Available to Enforcement

At present, there are assets of the debtor which cannot be seized or attached by an unsecured creditor, or which are difficult or impossible for the sheriff to sell or otherwise realize upon. Some assets escape the creditor's grasp because of the inadequacies of the present remedies rather than because of a considered policy.

Our tentative view is that all assets and income of the debtor should be exigible or attachable by his or her unsecured creditors, unless there is some good reason for coming to a different result. Any defects in the sheriff's or the creditor's power to realize on such assets should be corrected, again unless there is a countervailing policy.

The most obvious reason why assets or income should not be exigible or attachable is that they are necessary to the survival of the debtor, and to his or her continued ability to work. There may be other countervailing values which should lead us to exempt assets from execution or attachment.

The Institute invites comment on what exceptions should exist to the general rule that all assets owned by the debtor should be available to execution or attachment.

(6) Creditor Control of the Enforcement Process

We discuss in chapter 5 several critics of the present creditors' remedies system who propose fundamental changes, including an attack on the present degree of creditor control over the enforcement process. These critics would substitute the state for the creditor as the principal controller of the debt collection system. For the state to exercise this function, it would be necessary that every judgment debtor be examined by a judicial or administrative officer regarding assets before the state could decide whether a judgment should be enforced and, if so, by what means.

The issue for us is whether the enforcement of money claims and judgments should continue to be controlled by the creditor within the limits imposed by the law, or whether this is properly a function for a judicial or administrative officer of the state. Our tentative view is that creditor control should continue to be the rule, and that the schemes discussed in chapter 5 should be rejected.

Any system of compulsory mediation, arbitration or other state control of the remedial system would increase substantially the cost and the complexity of the creditors' remedies process. Increased delay in debt collection is also inevitable in a system which requires that all debtors be examined as to their resources before enforcement can take place.

It seems sensible to us to leave to the creditor the responsibility to initiate and to carry on the debt collection process. It is the creditor who wants to realize on the judgment and who will benefit from doing so. Let the creditor take the necessary steps to put the legal machinery in motion, to choose the appropriate remedy and to pay the costs on a step by step basis. It may well be that there should be limits to the use of the judicial collection machinery but the initiative should in our view remain with the creditor to invoke such remedies as appear useful to collect the debt. There is also, to our mind, a distastefully paternalistic quality about the proposals of the radical critics. Debtors and to some extent creditors are assumed to be inadequate to figure out their own problems and to reach sensible solutions.

The upshot of the above discussion is that we tentatively recommend that Alberta retain the principle of creditor control of the enforcement of money claims and judgments. We think that the creditor should continue to initiate and pursue recovery remedies, and should choose which remedies to pursue. The cost, delay and paternalism inherent in state-controlled enforcement schemes like those discussed in chapter 5 lead us to reject them for this jurisdiction. State enforcement schemes are much more appropriate in the narrow context of maintenance defaulters, but they should not be used for the enforcement of claims and judgments generally.

(7) Pre-Judgment Remedies

It has long been appreciated that pre-judgment remedies are potentially dangerous because they enable an unscrupulous plaintiff to exert considerable pressure on a defendant to settle rather than defend. While the Institute recognizes the dangers inherent in any pre-judgment remedy, we think that there are cases where such an extraordinary process is justified. The basic principle is that a creditor should have a reasonably effective means of collecting debts, and that a debtor should not be allowed to defeat collection by the simple expedient of moving assets outside the jurisdiction or disposing of them within the jurisdiction but outside the normal course of business.

We therefore tentatively propose that a plaintiff who is claiming some sort of monetary judgment should, before judgment is obtained, be able in narrowly defined situations to attach property of the defendant in order to ensure that it will be available for execution or attachment once the plaintiff obtains judgment. We invite comment on the limits and conditions which should be placed on pre-judgment remedies.

(8) The Enforcement Order - A New Post-Judgment Remedy

At present, the law makes available to judgment creditors several remedies, the most commonly used being execution and attachment of debts. Our discussion of these remedies in chapters 2 and 3 of this report reveals serious problems with the law, viewed from the perspective of creditors, debtors or society as a whole. The existing remedies are expensive, time-consuming, badly organized and not particularly productive. The existence of two separate remedies, execution and attachment of debts, to attach the debtor's property leads to uncertainty as to which remedy applies to certain assets or whether both must be used in tandem. Reform at a fundamental level appears to us to be appropriate.

In our view, it is not enough simply to patch up the existing remedies. We therefore tentatively recommend that all existing remedies for the enforcement of money judgments should be abolished and replaced by one new remedy, to be called the enforcement order (hereafter E.O.). This new process will be designed to catch all real and personal property of the judgment debtor, including debts owing to him or her.

The justification for replacing the existing remedies with one process is that the latter should be more efficient. It is probably more satisfactory to provide that the one remedy can get at everything than to try to delineate an artificial margin. It is better that the creditor be able to function with one piece of paper than with two and one attendance at the clerk's office instead of two, and it is probably more efficient that all administration be in one place. There is the further point that the one document could be written in English and say what it means; no doubt the writ and the garnishee could be translated and simplified so that they would do this, but then it might as well all be done in one document.

In this report, we will not work out all the details of our proposal, but we will sketch in the basic characteristics of the E.O. In this summary, we cannot review all the detailed proposals we have to make in chapter 6 about such issues as the effect of filing the E.O. in the sheriff's office, a public register of E.Os., the order's province-wide effect, the sheriff's duty to seize when instructed to do so, the effect of seizure, and the relationship of the seizure process with personal property security legislation, when enacted in Alberta.

Here again we emphasize the tentative character of our proposals. The substitution of one enforcement process in place of the present remedies would be a radical change in Alberta law. We are anxious to get comment on all aspects of our proposed enforcement order.

(9) Execution Against Land

We earlier proposed that all property of the debtor should be exigible by his or her unsecured creditors, and we see no reason to exempt land from that policy. We therefore tentatively recommend that all interests in land of the judgment debtor should be exigible pursuant to an E.O. unless there is some good reason, such as the policy underlying exemptions legislation, for coming to a different result. We equally see no reason why unregistered interests in land should not be available to execution, and we so recommend.

At present, most land is bound by the filing of a writ of execution in a land titles office. This seems unavoidable in a Torrens system, and we tentatively recommend that the same rule should apply to E.Os., namely, that the binding effect of an E.O. against land should occur when a certified copy of the E.O. is filed at a land titles office. We seek guidance on the difficult question whether E.Os. should continue to be filed in the general register against the name of the registered debtor, or whether the law should require that E.Os. be filed against the specific parcel of land owned by the debtor.

(10) Attachment of Debts

Apart from questions of detail arising from our earlier proposal to create a uniform remedy against property and debts, we have two significant recommendations:

(i) The Institute's 1978 working paper on exemptions raised the threshold issue whether wage garnishment should be permitted at all in Alberta. Having reviewed the arguments on both sides, we have now concluded that wage garnishment should be retained as a remedy for unsecured judgment creditors.

(ii) As the law presently stands, the only debt that can be attached is one which is due or accruing due. As a result, there are many payments made on a periodic basis where none of the future payments can be attached because they are neither due nor accruing due. The best example is wages or salary where a new summons must be issued and served on the employer for each pay period, as close to the end of the period as possible. The result is that the creditor is forced to deluge the employer with bi-weekly or monthly garnishee summonses, to each of which the employer must respond.

While the problem arises most commonly with the attachment of future income payments, it can occur in other situations, such as rent, payments on an agreement for sale of land, and future payments due on a promissory note. In these cases, the "debts due or accruing due" formula requires the issue and service of a new garnishee summons at every due date. The result is increased cost and trouble for all concerned.

We have come to the view that a continuing garnishee order for future income and non-income payments is a useful reform, and we tentatively recommend it. We ask advice on the limits on and requirements to obtain this remedy.

(11) Distribution of the Proceeds of Enforcement

The principle upon which the Execution Creditors Act is based is that the proceeds of execution, attachment, garnishment and equitable execution should be shared pro rata by all creditors who file and maintain writs of execution in the sheriff's office. (We call this "the sharing principle".) The principle upon which the common law was based was that the proceeds of execution should be paid to writ-holders in order of priority of the writs, based on their respective times of delivery to the sheriff. (We call this "the priority principle".)

The issue to be determined is which of these two principles should be the law of Alberta. There are serious arguments in favour of both. However we are swayed by two considerations. We note, first, that Alberta has for decades maintained legislation based upon the sharing principle, and we think that it is for those who want the principle to be abandoned to make the case for abandonment. We note, second, that in our view an important interest which should be considered in choosing between the priority principle and the sharing principle is the interest of creditors, and our tentative view is that we should not recommend the rejection of the sharing principle for the priority principle unless creditors ask for it. We invite comment from creditors and from others as well.

If the sharing principle is retained, we ask for advice on how to change the Execution Creditors Act to carry out more clearly and effectively its policy.

PART II. REPORT ON CREDITORS' REMEDIES FOR UNSECURED DEBTS

CHAPTER 1. INTRODUCTION

a. Purpose and Limits of the Report

1.1 The purpose of this report is to examine the remedies available under Alberta law to unsecured creditors for collection of their debts, and to make tentative proposals for the reform of those remedies. In January, 1982, the Institute decided to embark on a general study of unsecured creditors' remedies. In June, 1984, we published Report No. 42: Debt Collection Practices which dealt with extra-judicial collections and recommended changes to the Collection Practices Act. We now turn to the remedies offered by the legal system where extra-judicial collection methods fail and the creditor finds it necessary to sue the debtor.

1.2 In chapters 2 to 7 of this report, we will describe the present law and discuss its weaknesses. We will set out what in our view are the basic goals and elements of an ideal creditors' remedies system, and will make proposals intended to bring our law closer to the ideal. These proposals are tentative and are intended to encourage discussion and comment.

1.3 The Institute will reconsider its views and prepare its final report and recommendations in light of comments received. The reader's attention is drawn to the list of proposals and requests for comment contained in chapter 7. It would be helpful if replies would refer to these issues where practicable, but commentators should feel free to address such questions as they see fit.

1.4 The principal focus is on the remedies available to the unsecured creditor who has obtained a money judgment against the debtor. We will not explore at length the prejudgment trial process by which the creditor obtains judgment. A common criticism of debtor-creditor law is that many debtors, because of their fear or ignorance, or because of inadequacies in service or in the trial process, fail to take part in the litigation process by asserting legitimate defences.[1] The criticism may have some validity, but it goes further than our present project by calling in question the adversary system as a whole. For the purposes of the present study, we do not challenge the assumption that the prejudgment litigation process is adequate to establish the rights of creditor and debtor. Instead we will concentrate on the remedies available to the creditor who can obtain a money judgment.[2]

1.5 Another major limitation to the present study is that it focuses on the remedies of unsecured creditors. We will not investigate the different and more potent remedies available to enforce chattel or real property security, except as they limit the rights of unsecured creditors. Nor will we examine directly the special rights of the Crown, landlords, maintenance claimants, employees and other preferred creditors. The reason is simply to keep the present project within manageable bounds.

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[1] See e.g., Caplovitz, Consumers in Trouble: A Study of Debtors in Default (1974), pp. 37-46, 191-224, hereafter Caplovitz.

[2] Nor will we look at the availability or utility of plans to insure the debtor at the time of granting of credit against sickness or unemployment leading to nonpayment. See Doig and Millar, Debt Recovery--A Review of Creditors' Practices and Policies (1981), p. 5 (hereafter Scot. R.R. #8).

1.6 Some other exclusions should be mentioned. We will say nothing here about interest on debts or on judgments, credit reporting, or fraudulent preferences and conveyances. Because of our focus on the remedies for the enforcement of money claims and judgments, we will not consider the jurisdiction to grant orders for the delivery of specific goods or for the possession of real property. Nor will we examine non-proprietary creditors' remedies, such as the right of the hydro company to cut off service to a delinquent customer.

b. Conduct of the Study

(1) Early Work

1.7 The unsecured creditors' remedies study originated from a request by the Attorney General to write a report on exemptions from execution. Professor Dunlop prepared a research paper on exemptions from execution and garnishment which was presented to the Institute Board in 1976. Iain Ramsay, then counsel to the Institute, reworked the paper into an Institute working paper, entitled Exemptions from Execution and Wage Garnishment, published in January, 1978.

1.8 After the publication of the working paper, the Institute continued and broadened its interest in unsecured creditors' remedies. One handicap was the absence of any collections of statistics on the operation of these processes, apart from the basic information contained in the annual reports of the Attorney General to the Legislative Assembly. Alberta is not unique in this neglect of judicial statistics on the use of civil remedies. Most jurisdictions have done little or no research of this kind, although there are empirical studies of other aspects of the debt collection system.[3] One notable exception is Scotland where the Law Commission recently published eight research reports as a part of their study on diligence.[4] We will refer to the relevant conclusions of the Scottish researchers later in this paper.

1.9 The Institute decided early in the creditors' remedies project to attempt to repair this deficiency by collecting its own statistics on the subject. Mr. Ramsay and Professor Dunlop conducted separate studies. The Ramsay report, entitled The Use, Effectiveness and Social Impact of Wage Garnishment: An Empirical Study[5] was tendered to the Institute in March, 1980. Mr. Ramsay's covering memorandum described the report as a "rough first draft" and "in no sense a finished product." A final report was not completed. However the "first draft" contains much useful information and analysis which will be referred to below.

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[3] See, e.g., Jacob, Debtors in Court: The Consumption of Government Services (1969); Caplovitz, Consumers in Trouble: A Study of Debtors in Default (1974); Trebilcock and Shulman, "The Pathology of Credit Breakdown" (1976), 22 McGill L.J. 415; Puckett, "Credit Casualties: A Study of Wage Garnishment in Ontario" (1978), 28 U. of T.L.J. 95; Ison, Credit Marketing and Consumer Protection (1979). Hereafter the references found in the Table of Abbreviated References will be used.

[4] Scottish Office, Central Research Unit Papers: Research Reports 1-8 for the Scottish Law Commission (1980-81)--hereafter Scot. R.R. #1-8. The Scottish Law Commission has also published a draft report on diligence in five volumes--hereafter Scot. Memos. #47-51 (1980) and a final report: Report on Diligence and Debtor Protection (2 vols., 1985). We will refer to the Scottish draft report rather than to the final report which arrived too late for inclusion.

[5] Hereafter the Ramsay Report.

1.10 After an introduction to earlier studies and a discussion of basic concepts, the Ramsay report goes on to report the results of two groups of empirical studies. The first group consisted of two court file surveys intended to collect statistics on the use of creditors' remedies, especially wage garnishment. The second group consisted of personal interviews of a small number of debtors and creditors, and telephone interviews of the debtors' employers. In addition, Ramsay interviewed lawyers with substantial collection practices and officials of the Family Financial Counselling Service of the Alberta Department of Consumer and Corporate Affairs. The Ramsay report ends with a summary of the collection process and proposals for reform. Mr. Ramsay expanded upon his reform recommendations in a later draft report.[6]

1.11 As the title suggests, the Ramsay report was primarily concerned with wage garnishment. The study was further limited to files maintained at the clerk of the court's office for the judicial district of Edmonton. The Institute felt that it would be useful to conduct a second study of all remedies used by Alberta unsecured creditors, particularly execution, and to make that study cover various types of judicial districts in order to see what differences existed among districts in the use of remedies. This second study was conducted by Professor Dunlop with several law students. It has now been published under the title: The Operation of the Unsecured Creditors' Remedies System in Alberta but will be referred to below as the Dunlop Report.

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[6] Ramsay, Debt Recovery in Alberta: Proposals for Reform (1982)--hereafter the Ramsay Proposals.

(2) The Dunlop Report

1.12 The first step was to prepare an outline of the information to be collected in the second study. The Institute sought and obtained the agreement and cooperation of the Department of the Attorney General. The actual collection of the data began in August, 1982 and was completed a year later. Different parts of this report were written by the authors listed on the cover, and their work was then revised and rewritten by Professor Dunlop.

1.13 The Dunlop study described its purposes as follows:

> The study had four objectives. The first was to discover how many plaintiffs who sue and obtain a money judgment use any enforcement remedies. Secondly we wanted to find out which remedies are commonly used and which are rarely initiated. Our third goal was to discover how these remedies operate and, in the case of execution, how far the remedy is pursued. Finally, we wanted to form an opinion of the success of the process in collecting money for judgment creditors.[7]

1.14 The first step was to examine a random sample of files in the offices of the clerks of the Court of Queen's Bench for three judicial districts. The study was limited to files opened during 1980 and 1981. The three judicial districts were chosen in consultation with the Attorney General's Department to represent cities, towns and rural parts of the province.

1.15 The files were divided into three groups. Group I consisted of files in which the litigation had not gone to judgment or an order determining the basic issue between the parties. Group II represented files in which the litigation had proceeded to a judgment which was, for various reasons, not of interest. Group II included judgments ordering non-monetary relief, foreclosure actions (unless a writ of execution was issued), distress warrants and matrimonial disputes. While matrimonial disputes may often lead to the use of creditors' remedies, they were excluded because they have been extensively studied in this province. Group III consisted of all remaining files in which there was a money judgment or judgments.

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[7] Dunlop Report, para. 1.6.

1.16 The rest of the empirical study involved an examination of the judgments in Group III and the remedies used to enforce those judgments. The researchers looked to see if the judgments had been enforced and, if so, by what means. Where writs of execution were issued, an attempt was made to find out whether they were filed with the sheriff (or sheriffs), the land titles office (or offices) or both. Where the writ was filed with the sheriff, the researchers were interested in seeing whether it was renewed, whether instructions to seize were issued and what was the outcome of the attempted seizure. The study looked at examinations in aid of execution, and removal and sale applications. As far as attachment of debts are concerned, the researchers examined the number of garnishee summonses issued, the type of debt attached and the outcome.

1.17 Finally some effort was made to determine the success of the system in collecting debts for the creditors. Such an estimate is bound to be incomplete where the study concentrates on court files alone. However it was possible to count the number of satisfaction pieces and to calculate the amounts of money paid in by garnishees or resulting from sheriffs' sales. The result gave some basis for estimating how effective the system is for unsecured judgment creditors.

1.18 The Institute has published the complete empirical study as Research Paper No. 16. The results of it and of the earlier Ramsay study are referred to throughout this report.

(3) The Present Report

1.19 In addition to the empirical research discussed above, Mr. Ramsay and Professor Dunlop carried out studies of the existing law in Alberta and elsewhere. Reports of other law reform agencies were reviewed, and their appropriateness to Alberta considered. While the present report was drafted by Professor Dunlop, it relies in many places on previous research by Mr. Ramsay.

CHAPTER 2. THE PRESENT SYSTEM OF CREDITORS' REMEDIES

a. Introduction

2.1 In this chapter, we will describe the remedies available to a person who can obtain a money judgment against another in the Court of Queen's Bench or the Provincial Court of Alberta.[1] Our primary focus will be on legal rules and structures, but we will also summarize the results of the two empirical studies conducted by the Institute into the use of remedies in the period from 1978 to 1983.[2] We will say something about the relief available to an overburdened debtor under the present Bankruptcy Act and the most recent version of the proposed Bankruptcy Bill.[3]

b. Getting to Judgment

2.2 An Alberta unsecured creditor will usually seek to collect from a debtor by personal communication or perhaps by using a collection agency.[4] If these methods fail, the creditor may either abandon the claim or may commence a lawsuit against the debtor. If he or she chooses to commence a lawsuit and obtains judgment, a variety of legal remedies are available. Execution is theoretically (with one anomalous exception) a post-judgment remedy, and attachment of debts is usually obtained after judgment. There are some little-used remedies which are available immediately after the action is commenced, but the starting point for creditors' remedies is usually the pronouncement of judgment in the creditor's action against the debtor or the entry of a default judgment.

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[1] We will not discuss in this report the remedies available to a creditor who sues in the Federal Court. The General Rules and Orders of that Court empower it to issue writs of fieri facias (rr. 1900-2108), attachment of debts orders (rr. 2300-2301), charging orders on land (r. 2400), on shares, bonds and other securities (r. 2401) and on money in court (rr. 2402-2404). As to receivership orders, see Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), s. 44, and rule 2405. Subsection 56(1) of the Federal Court Act empowers the Court, in addition to remedies prescribed by the Rules, to issue "process against the person or the property of any party" similar to process available in the superior court of the province in which the judgment is to be executed.

[2] The Ramsay and Dunlop Reports.

[3] Bankruptcy Act, R.S.C. 1970, c. B-3. The latest Bankruptcy Bill (which was not passed) is 1984 (Can.), Bill C-17.

[4] See Institute of Law Research and Reform, Debt Collection Practices: Report No. 42 (1984).

2.3 The most common way for a creditor to sue is by the commencement of an action in the Court of Queen's Bench which is carried to judgment pursuant to the Alberta Rules of Court. The Court of Queen's Bench has jurisdiction to hear any civil action for debt or damages, no matter how much or how little is claimed.

2.4 An ordinary litigant may instead commence an action for debt or damages in the Provincial Court of Alberta if the claim does not exceed $2,000.[5] A provincial court judge can give judgment in such an action, but the judgment can be enforced only through the Court of Queen's Bench. Section 57 of the Provincial Court Act provides that the clerk shall prepare a certificate of each judgment given under Part 4 of the Act ("Small Claims Matters") and shall furnish a copy of the certificate to each party to the action. Section 57(3) provides as follows:

> (3) The person in whose favour judgment is given may file the certificate of judgment in the Court of Queen's Bench and on being filed
>
> (a) the judgment becomes a judgment of

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[5] Provincial Court Act, R.S.A. 1980, c. P-20, ss. 36-37.

> the Court of Queen's Bench, and
>
> (b) execution and garnishee summons may be issued according to the ordinary procedure of the Court of Queen's Bench.

2.5 The effect of section 57(3) would appear to be that the plaintiff in a provincial court action cannot obtain a garnishee summons before judgment. Section 73 of the Act provides:

> 73 If anything necessary for carrying out the objects of this Part is not contained in this Act or the regulations, the remedies, practice and procedure contained in the Alberta Rules of Court may be applied.

One assumes that sections 73 and 57(3) do not permit a provincial court judge to issue a garnishee summons before judgment, although it is remotely possible that he or she can issue an attachment order under Rules 485-93[6] and perhaps other less common pre-judgment remedies.

2.6 There is a group of administrative tribunals and government agencies which can skip the normal litigation process and go directly to judgment. For example, an unpaid assessment under the Workers' Compensation Act can be certified by the secretary to the Board and filed with the clerk of the Court of Queen's Bench, following which it may be enforced as a judgment of the Court.[7]

2.7 The Dunlop empirical study of Alberta creditors' remedies examined 2316 non-matrimonial money judgments filed in the clerks' offices of the Court of Queen's Bench for three judicial districts during the years 1980 and 1981. 65.5% of the sample were judgments obtained in the Court of Queen's Bench.[8] Another 23.6% were certificates of judgments obtained in the Provincial Court and filed in the Court of Queen's Bench, thereby becoming judgments of the latter court. The researchers did not search the Provincial Court files directly to ascertain what percentage of judgments obtained there lead to certificates which are filed in the Court of Queen's Bench. The remaining 11% was made up largely of orders or certificates of various administrative bodies. These certificates, once filed in Queen's Bench, became judgments of that court or could be enforced as such.

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[6] Of the Alberta Rules of Court.

[7] Workers' Compensation Act, R.S.A. 1980, c. W-15, ss. 78, 87-88.

2.8 Both Dunlop and Ramsay concluded that about one-half of the judgments in their samples were for amounts less than $1000.[9] Ramsay found that 34% of his sample of claims enforced by garnishee summonses were for debts under $500. Larger debts (over $1400) were primarily represented by bank and finance company loan claims. It is important to remember that the courts are not just for large dollar claims, but are used extensively for the collection of relatively small sums of money.

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[8] Dunlop Report, c. 3.

[9] Dunlop Report, para. 3.12; Ramsay Report, pp. 53-65. In the Dunlop study, the cut-off point is $1004. This figure is significant because $1000 was during the relevant period the maximum claim allowed in the Small Claims Division of the Provincial Court. See Provincial Court Act, R.S.A. 1980, c. P-20, s. 36. $4.00 is the usual amount of costs awarded on such a judgment. See Alberta Rules of Court, Appendix E, Number 6. It was felt advisable to keep all of the Provincial Court judgments together rather than including some of them in a higher dollar category because of the $4.00 costs.

2.9 Ramsay found that over 40% of all retail claims were for amounts under $500, and 52.4% of individual claims were under $500. 55% of claims for professional services were for amounts under $500. There were no department store claims over $2500. Of actions by utilities, 33.3% were under $200, 20% under $299 and 20% under $399. Thus, almost 75% of actions by utilities were under $400.

2.10 Researchers for the Scottish Law Commission also found that the creditors' remedies system is used to enforce relatively small claims.[10] They concluded that, as the creditor progressed along the execution process, increasing amounts of principal sum were involved. It would seem reasonable to expect a similar result in Alberta. A creditor with a judgment for a small dollar amount is more likely to issue a writ of execution than to go on to instruct seizure and sale.

c. The Use of the Court of Queen's Bench for Claims under $1000

2.11 During 1980 and 1981, a litigant with a claim under $1000 could sue either in the Court of Queen's Bench or in the Provincial Court. When Dunlop examined all of his judgments below $1004, he found that 385 (or 35.1%) of those plaintiffs had sued in Queen's Bench rather than in Provincial Court.[11] If we delete those litigants, like administrative tribunals, who were required by statute to sue or to file their orders in Queen's Bench, the percentage of litigants choosing that court would be somewhat lower.

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[10] Scot. R.R. #1, pp. 19-21; Scot. R.R. #2, pp. 8-9, 16; Scot. R.R. #3, pp. 13-16.

[11] Dunlop Report, paras. 3.24-3.27.

2.12 We can think of two reasons why a litigant, especially if represented by a lawyer, might choose Queen's Bench over the Provincial Court.

(1) If the plaintiff's claim is for a debt or a liquidated demand and if the defendant does not file a statement of defence or a demand of notice, the plaintiff can enter judgment under Rule 148 of the Alberta Rules of Court without being required to appear before a judge. In Provincial Court, all actions are set down for hearing and the plaintiff in effect must attend if he or she wants to get judgment.

(2) While costs can be granted in both courts, they are likely to be more substantial in Queen's Bench than in Provincial Court.

2.13 Given these two reasons, one is tempted to speculate that lawyers actively representing plaintiff-clients are likely to choose the Court of Queen's Bench, even for small claims. Provincial Court would likely be more attractive to plaintiffs who have a substantial number of claims and who tend not to use lawyers. Our investigation was not sufficiently extensive to prove or disprove these ideas.

d. Pre-Judgment Creditors' Remedies

2.14 Before a creditor obtains judgment, he or she has in limited circumstances some remedies against the property of the debtor. The objective of these pre-judgment remedies is to attach property of the debtor in order to ensure that it will be available once the creditor obtains judgment. The following discussion concentrates on the Court of Queen's Bench although, as we noted earlier, it is remotely possible that some of these remedies are available in the Provincial Court of Alberta. The principal pre-judgment remedies are discussed below.[12]

(1) Attachment of Debts

2.15 Rule 470(1) of the Alberta Rules of Court provides as follows:

> 470(1) In any action for a debt or liquidated demand, upon affidavit by the plaintiff, his solicitor or agent
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> (a) swearing positively to the facts establishing his cause of action,
>
> (b) stating his belief that the plaintiff is entitled to the relief claimed,
>
> (c) exhibiting an undertaking of the plaintiff that if monies are paid into court under a garnishee summons issued pursuant to leave granted upon this application, he will proceed with the action without delay, and
>
> (d) establishing a reasonable possibility that the plaintiff will be unable to collect all or part of his claim or be subjected to unreasonable delay in the collection thereof unless permitted to issue a garnishee summons,
>
> the court may, upon ex parte application, grant leave to the plaintiff to issue a garnishee summons before judgment.

The supporting affidavit must also satisfy Rule 470(3), which is not relevant here. In contrast, a garnishee summons after judgment may be issued without leave pursuant to Rule 470(2), although the affidavit in support must also satisfy Rule 470(3).

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[12] Much of the following material is drawn from Dunlop, "Pre-Judgment and Post-Judgment Remedies of Unsecured Creditors," in Legal Education Society of Alberta, Dealings between Creditor and Debtor (1982).

2.16 The opening words of Rule 470(1) make it clear that the plaintiff must commence action before he or she can obtain a garnishee summons. Moreover, the affidavit in support must be sworn after the commencement of the action.[13] An order issued on the basis of an affidavit which is sworn before the commencement of the action is probably a nullity, with the result that money paid into court will be paid out to the defendant or the garnishee but not to the creditor.[14]

2.17 A garnishee summons can issue before judgment only if the plaintiff's cause of action is "for a debt or liquidated demand."[15] "Liquidated demand" is defined in Rule 5(i) of the Alberta Rules of Court. The term "debt" is not defined in the Rules but there is much case law on the subject. Professor Dunlop has summarized these decisions elsewhere as follows:

> [W]hile the term takes shades of meaning from its surroundings, the normal use of the word "debt" is to describe an obligation to pay a sum certain or a sum readily reducible to a certainty. Such a definition will include claims based on contract, restitution, equity or on statute, so long as there exists an obligation to pay a certain or ascertainable sum. However claims for unliquidated damages will generally be excluded.[16]

2.18 The courts have often said that the attachment of debts before judgment is an extraordinary remedy, the use of which involves a real possibility of abuse. As a result, there are numerous cases which insist that the applicant adhere strictly and precisely to the requirements of the Rules in seeking such relief.[17] Rule 470(5) gives the court power to relieve against irregularities, but the power will not be exercised unless the error is trivial.[18]

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[13] McParland v. Seymour, [1925] 3 W.W.R. 666 (Alta. A.D.); Erwin W. Block Professional Corporation v. Dickson (1979), 10 Alta. L.R. (2d) 322.

[14] Dunlop, Creditor-Debtor Law in Canada (1981), pp. 230-31, hereafter Dunlop Book.

[15] Alberta Rules of Court, r. 470(1).

[16] Dunlop Book, p. 224.

2.19 The Dunlop study established that very few creditors apply for or obtain leave to attach debts before judgment.[19] 13 claims enforced by garnishment (1.9% of all such claims) were enforced by pre-judgment garnishees. The reasons are probably the cost in obtaining leave, because of the requirement of an appearance before a master or a judge, and the difficulty in satisfying the grounds set out in Rule 470(1). In most cases, the creditor is further ahead to wait until obtaining judgment before issuing a garnishee summons. No application is needed, the summons is relatively mechanical and the grounds for issue are much more lenient.

2.20 Ramsay also found that pre-judgment garnishment was applied for in only 2% of his sample. Pre-judgment garnishment was not used by major creditors and was not used to any significant extent by retailers. Ramsay concluded that the high costs of the remedy precluded its use except where there was a large amount outstanding and a high probability of recovery.

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[17] See e.g., Alberta Tractor Parts Ltd. v. Czech Construction Ltd. (1959), 30 W.W.R. 163 (Alta. T.D.); Northwest Farm Equipment Ltd. v. Big Rock Motors Ltd., Alta. C.A., 10th October, 1967 (unreported); Avco Finance Ltd. v. Suppa (1967), 62 W.W.R. 124 (N.W.T. Terr. Ct.); Dunlop Book, pp. 228-31.

[18] Cases cited supra, note 17.

[19] Dunlop Report, paras. 8.6-8.9.

> Pre-judgment garnishment appears from our evidence to be used by one shot rather than repeat players.... It appears to be slightly more effective in getting money paid into court than post-judgment garnishment.[20]

2.21 The wages of provincial public servants are attached under the Civil Service Garnishee Act.[21] It has been held under a similar Northwest Territories ordinance that the remedy is available before judgment,[22] but it is submitted that the better view is that the remedy is not available until a money judgment or order against the civil servant has been obtained.[23]

(2) Attachment of Assets

2.22 Rule 485 of the Alberta Rules of Court provides in part as follows:

> 485 After the commencement of any action wherein the claim is for recovery of a debt of $200 or upwards,
>
> (a) upon affidavit, made by the plaintiff or one of several plaintiffs, if more than one, or by his or their agent swearing positively to the facts establishing the debt and that he has reason to believe, specifying the grounds of his belief, that the defendant
>
> (i) is about to abscond or has absconded from Alberta, leaving personal property liable to seizure under

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[20] Ramsay Report, p. 70. It is possible that orders permitting pre-judgment garnishment are granted only in cases where there is clear evidence of a debt, whereas post-judgment garnishment has no such check on its issue.

[21] R.S.A. 1980, c. C-11.

[22] Laurentide Finance Co. Ltd. v. Thomas, [1972] 6 W.W.R. 99 (N.W.T. Mag. Ct.).

[23] Dunlop Book, pp. 231-33.

> execution, or
>
> (ii) has attempted to remove any of his personal property out of Alberta or to sell or dispose thereof with intent to defraud his creditors generally or the plaintiff in particular, or
>
> (iii) keeps concealed to avoid service of process,
>
> and that the deponent verily believes that without the benefit of the attachment the plaintiff will lose his debt or sustain damage,
>
> [and upon the further affidavit of one other person to the same effect],
> the court may, on application to it ex parte, direct the clerk to issue a writ of attachment in Form M in the schedule, which writ shall be executed by the sheriff according to its tenor.

2.23 The remedy is rarely used, probably because of the difficulty in meeting its requirements. (We found no cases of attachment of assets in our empirical study.) As in the case of attachment of debts before judgment, the courts have demanded precise compliance in form and substance with the Rules[24] although, in Meadow Lake Car Sales Ltd. v. Michaud,[25] it was held that the second affidavit required by Rule 485 could be dispensed with where the evidence and counsel's admissions rendered it unnecessary.[26]

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[24] Dunlop Book, p. 207; Stevenson and Côté, An Annotation of the Alberta Rules of Court (Juriliber, 1981), p. 445.

[25] (1978), 7 Alta. L.R. (2d) 289.

[26] The application in the Meadow Lake Car Sales case was in fact dismissed because the plaintiff by counterclaim failed to prove that the defendant by counterclaim was attempting to remove goods "with intent to defraud".

(3) Receiver

2.24 Pursuant to section 13(2) of the Judicature Act[27] and Rules 463 to 466 of the Alberta Rules of Court, a receiver by way of equitable execution may be appointed before as well as after judgment.[28] As will be seen later, the remedy has been severely restricted by the courts with the result that it will today not be granted except in very special circumstances.[29]

2.25 Rule 465 provides for the appointment of a receiver before or after judgment in the narrow case of auction sales. It provides in part as follows:

> 465(1) If a debtor advertises a sale of his goods by auction, a creditor either before or after judgment may apply for a receiver and the court, if satisfied the creditor's claim is likely to be defeated, delayed or hindered, may appoint the sheriff or deputy sheriff receiver of the proceeds of the sale of such of the goods as are not exempt from seizure.

2.26 Equitable execution as a remedy is very rarely used in Alberta. Of the 2316 judgments examined in the Dunlop study, only seven were found in which there was an application for the appointment of a receiver pursuant to Rule 466 and none under Rule 465. Of these, four were granted. It is interesting to note that all applications and orders occurred in one judicial district.

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[27] R.S.A. 1980, c. J-1, s. 13(2).

[28] See Dunlop Book, p. 281. The relevant rules are discussed _infra_, at paras. 2.146-2.157.

[29] See _Fox_ v. _Peterson Livestock Ltd_. (1982), 17 Alta. L.R. (2d) 311 (C.A.).

2.27 The three orders granted in 1980 all appointed the sheriff receiver of federal government oil money payable to native debtors living on an Indian reservation. In 1981, one order was made appointing the sheriff receiver of money to be paid to the debtor from an estate. Clearly each of these instances represents a rather unusual situation. The three cases on oil money payable to native debtors may be of doubtful validity after Fox v. Peterson Livestock Ltd.[30]

(4) Emergency Judgment

2.28 Rule 161 permits the grant of a judgment earlier than usual in an emergency.[31] The Rule is as follows:

> 161(1) At any time after the issue of the statement of claim, on special reason for urgency being shown, the plaintiff may, by leave obtained, *ex parte*, serve a notice of motion for judgment.
>
> (2) The court giving leave may give special directions as to the service of the notice of motion.
>
> (3) Upon the hearing of the motion the court, instead of either granting or refusing the application, may give such directions for the examination of either parties or witnesses, or for the making of further inquiries, or with respect to the further prosecution of the suit or otherwise as the case may require, and upon terms as to costs.

We found no applications or orders under Rule 161 in our empirical study.

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[30] Ibid.

[31] The word "emergency" is used in the marginal note but not in the body of the rule. See generally Stevenson and Côté, supra, note 24, at pp. 189-90.

2.29 The emergency judgment procedure will not be considered further in this study. It may be used by a creditor seeking to proceed to execution more quickly than usual, but it may also be used for other purposes. The process is better studied as a rule of civil procedure which permits the plaintiff to shorten up the period from statement of claim to judgment. It is not appropriate to consider it further in the present study which concentrates on the remedial system.

(5) The Mareva Injunction

2.30 Before 1975, it was assumed that an unsecured creditor could not before judgment obtain an injunction freezing the debtor's assets until judgment was obtained.[32] Exceptions to the general rule existed where (1) the plaintiff sought an order to detain or preserve property of the defendant, if that property was the subject matter of the litigation,[33] (2) "the processes of the court [had to] be protected even by initiatives taken by the court itself,"[34] (3) the plaintiff alleged that the defendant had made a fraudulent disposition of his property or had practised fraud or theft on the plaintiff,[35] (4) the plaintiff alleged a fiduciary relationship between him or her and the defendant, or

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[32] The material in this section is drawn partly from the sources cited supra in notes 12 and 14, and from Dunlop, Supplement to Creditor-Debtor Law in Canada (1984), c. 7 (hereafter Dunlop Supplement). The authoritative decision on the Mareva injunction in Canada is now Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2.

[33] See Alberta Rules of Court, r. 468(a).

[34] Aetna Financial Services Ltd. v. Feigelman, supra, note 32, at p. 13.

[35] Compare Aetna Financial Services Ltd. v. Feigelman, supra, note 32 at p. 14, where this exception is expressed as "to prevent fraud both on the court and on the adversary."

(5) the plaintiff asked for a quia timet injunction "under extreme circumstances which included a real or impending threat to remove contested assets from the jurisdiction."[36] Other pre-judgment remedies might be available, but an injunction was not one of them.

2.31 The assumption discussed above has been rudely challenged in a series of recent English cases which have permitted a plaintiff to obtain an injunction before judgment to freeze the assets of the defendant. The process is called the Mareva injunction, after one of the earliest decisions of the Court of Appeal granting the remedy.[37] The Mareva injunction has been imported into Canada, and has recently received the imprimatur of the Supreme Court.[38] The Alberta Judicature Act contains a section similar to those relied on by the English Court of Appeal and the Supreme Court of Canada.[39] The Mareva injunction is clearly part of Alberta law, although its scope is not completely settled.

2.32 The aims of the remedy have been described as (1) obtaining something akin to security, at least in the sense of ensuring that there is a fund available to meet any judgment, and (2) putting pressure on the defendant to provide proper security for the claim.[40] It has been generally held that the injunction does not create a proprietary right in the assets which are subject to the injunction; it merely restrains the owner and some third persons from dealing with the property in certain ways.[41] An injunction generally operates *in personam* and this view was expressly applied to the *Mareva* injunction in *Aetna Financial Services Ltd*. v. *Feigelman*.[42]

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[36] Aetna Financial Services Ltd. v. Feigelman, supra, note 32, at p. 14.

[37] Mareva Campania Naviera S.A. v. Int. Bulk Carriers S.A., [1975] 2 Lloyd's Rep. 509 (C.A.).

[38] Aetna Financial Services Ltd. v. Feigelman, supra, note 32. In the result, the Supreme Court set aside the injunction granted by the Manitoba trial court, but only after a lengthy judgment which expressly accepted the existence of the remedy as part of Canadian law.

[39] Judicature Act, R.S.A. 1980, c. J-1, s. 13(2). See also Alberta Rules of Court, r. 383(4). There are no reported cases on the process in Alberta, and our empirical study yielded no examples. Practitioners have told us of unreported decisions granting what amount of Mareva injunctions.

2.33 In the early cases, *Mareva* injunctions were granted against foreign non-resident defendants where there was a strong likelihood that the defendant would remove property from the jurisdiction before judgment could be obtained. However the remedy has since been extended to apply to (i) resident defendants where it is likely that assets may be removed from the jurisdiction, and (ii) resident or non-resident defendants where there is evidence that the defendant may dissipate assets before judgment within or without the jurisdiction.[43]

2.34 Two recent Canadian decisions suggest a more restricted scope for the remedy in this country. In *Chitel* v. *Rothbart*, the

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[40] Farrar, "The Effect of a Mareva Injunction", [1979] J.B.L. 278, 279.

[41] *Cretanor Maritime Co*. v. *Irish Marine Mgmt*., [1978] 3 All E.R. 164 (C.A.).

[42] *Supra*, note 32, at pp. 25-26. Impliedly the Supreme Court rejected the attempt by Lord Denning in *Z Ltd*. v. *A-Z*, [1982] Q.B. 558, 573 (C.A.) to turn the process into a remedy which operates *in rem*.

[43] *Chartered Bank* v. *Daklouche*, [1980] 1 All E.R. 205 (C.A.); *Barclay-Johnson* v. *Yuill*, [1980] 3 All E.R. 190; *Rahman* v. *Abu-Taha*, [1980] 1 W.L.R. 1268 (C.A.); *Liberty National Bank & Trust Co*. v. *Atkin* (1981), 31 O.R. (2d) 715; *Canadian Pacific Airlines Ltd*. v. *Hind* (1981), 32 O.R. (2d) 591.

Ontario Court of Appeal summarized the scope of the Mareva injunction as follows:

> The applicant [for the injunction] must persuade the Court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law.[44]

The restrictive formulation was referred to by the Supreme Court in Aetna Financial Services Ltd. v. Feigelman[45] in setting aside an injunction granted by the Manitoba trial judge and upheld by that province's Court of Appeal.

2.35 The courts in England and Canada have built up a large body of law on the Mareva injunction, including guidelines and requirements regarding its use. An important problem is to balance fairly the interests of plaintiff and defendant, while ensuring that affected third parties, like banks, are not injured. The remedy is now an established part of Canadian law, although doubts remain regarding its precise limits.

e. Judgment and Its Effect

2.36 For the purposes of this study, the principal effect of obtaining judgment is that the full range of post-judgment remedies becomes available to the creditor. That desirable consequence (from the creditor's point of view) can under all

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[44] Chitel v. Rothbart (1982), 30 C.P.C. 205 (Ont. C.A.).

[45] Supra, note 32, at p. 27.

Canadian legal systems be delayed or prevented by one or more of three devices:

(1) The judgment granted may be payable by instalments, with the result that the creditor cannot pursue execution and other post-judgment remedies so long as the debtor is paying the instalments.

(2) Execution on the judgment may be stayed pending appeal or on some other ground.

(3) Enforcement of the judgment may be stayed because the Bankruptcy Act has been brought into play or because of a consolidation order granted under provincial legislation. It is intended to discuss briefly each of these tactics.

(1) Instalment Judgments

2.37 Alberta courts have a limited jurisdiction to grant instalment judgments. Section 18(1)(a) of the Judicature Act[46] provides in part:

> 18(1) In a proceeding
>
> (a) for the recovery of a debt or liquidated demand,
>
> . . . .
>
> the Court in its discretion may at any stage of the proceeding grant a stay of proceedings on any terms that the Court may prescribe, and in like manner the Court in its discretion may with or without imposing terms, after final judgment in any proceeding whatsoever, grant a stay of execution of an order for sale or of other similar process, including a stay of an order for possession of land, and may by an order

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[46] R.S.A. 1980, c. J-1.

> granting the stay extend the time for payment of a judgment debt or the time for doing any act or making any payment prescribed by a previous order of the Court.

The court referred to "means the Court of Queen's Bench or, on appeal, the Court of Appeal."[47]

2.38 The other relevant provisions are clauses 29(5)(c) and (d) of the Seizures Act[48] which provide that the court on an application for an order for removal and sale of seized goods is empowered to do the following:

> (5) On the hearing of the application the evidence may be taken either orally or by affidavit as the Court directs and the Court
>
> . . . .
>
> (c) may make the order on any terms and conditions as to costs or otherwise it determines,
>
> (d) may by the same order, or on the application of the debtor by a subsequent order, suspend the operation of the order pending the payment of the debt by such instalments as the Court may fix, or the giving of such security or the performance of such other conditions as the Court may impose.

The court referred to "means the Court of Queen's Bench."[49]

2.39 The Provincial Court Act[50] is silent on the issue of instalment judgments, although the court is empowered on application to vary a judgment entered by default.[51] The Alberta Rules of Court say nothing directly about the question, but the court is empowered to post-date judgments[52] and (impliedly) to suspend their operation pending the performance of a condition.[53] The Alberta Rules of Court apply to the Court of Queen's Bench and, where necessary, to the Small Claims Division of the Provincial Court.[54]

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[47] Judicature Act, R.S.A. 1980, c. J-1, s. 1.

[48] R.S.A. 1980, c. S-11. See also ss. 34(2), 39(3), 40.

[49] Seizures Act, R.S.A. 1980, c. S-11, s. 1(b).

[50] R.S.A. 1980, c. P-20.

2.40 We are told that instalment orders granted pursuant to the Judicature Act and the Seizures Act are rare or non-existent. The explanation may lie in the ignorance of debtors as to these provisions or their reluctance to assert their rights. Creditors would for a variety of reasons be likely to resist any argument that a judgment should be drafted as an instalment order.

2.41 Assuming that such a judgment is granted, the creditor would not be permitted to invoke any remedies while the debtor is meeting the instalment payments. However, the case law has gone further and has decided that, unless the legislation otherwise provides, the creditor cannot revert to his or her original remedies even if the debtor misses a payment or payments.[55] As to the missed instalments, the English law permits the creditor to pursue remedies such as execution but a Canadian decision[56] would require the creditor to commence a new action for the instalment, go to judgment and then execute. Where the statute says so, the creditor may apply to vary or rescind an instalment order, and in the latter event his normal remedies will be restored. Neither the Judicature Act nor the Seizures Act provisions considered above are crystal clear on this point.

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[51] S. 55.

[52] R. 322.

[53] RR. 328, 345.

[54] Provincial Court Act, R.S.A. 1980, c. P-20, s. 73.

[55] See Dunlop Book, pp. 106-07.

[56] *Can. Surety Co*. v. *Spencer* (1963), 37 D.L.R. (2d) 646 (N.B.C.A.). Quaere whether the decision is limited to instalment orders issued in inferior courts and sought to be

2.42 Another reason for creditor resistance to instalment orders is section 13 of the Interest Act[57] which provides that judgment debts bear interest at 5% per annum. One person who was consulted about instalment orders granted under the Judicature Act section replied in part as follows:

> The difficulty with the section (assuming it is wide enough to cover the case of a judgment obtained by an unsecured creditor) is that after judgment the creditor may be restricted to interest at 5% (simple interest) because of section 13 of the Interest Act. This means, if the judgment debtor is given time to pay, that he is being given cheap financing. Judgment creditors naturally object to this. They have a point.

2.43 A third problem with the instalment judgment results from its effect on the equal sharing principle of the Execution Creditors Act.[58] An example will demonstrate the problem. Creditor A goes to judgment against debtor X, which judgment is expressed in instalments. Other creditors obtain normal (i.e., non-instalment) judgments against X, issue writs of execution and seize goods which are sold. If the instalments on A's judgment have been paid up to date, A has no right to share in the

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[56](cont'd) enforced in superior courts.

[57] Interest Act, R.S.C. 1970, c. I-18.

[58] R.S.A. 1980, c. E-14, s. 2.

proceeds of seizure and sale. If X is in arrears, then A can issue a writ and share in the distribution, but only for the unpaid instalments and not for the total amount of the judgment. This result seems unfair as between A and other unsecured creditors.

(2) Stay of Execution

2.44 The right of an unsuccessful litigant to obtain a stay of execution was originally created by the courts as an exercise of their inherent jurisdiction to prevent abuses of process.[59] The law on the subject has been largely codified, but the courts retain an inherent jurisdiction to stay execution in appropriate circumstances not dealt with by legislation.[60] The most common purpose of a stay of execution order is to preserve the situation pending an appeal, but a stay is also available in other circumstances.

2.45 The Canadian law regarding stays pending appeal has been described as follows:

> The Canadian legislation governing stay pending appeal can be divided into two major categories. Many provinces, following England, have enacted the equitable rule that the commencement of an appeal does not automatically stay execution on the judgment appealed from unless otherwise ordered. This policy favours the successful litigant at trial but has often proved to be a trap for the unwary or badly advised appellant. As a result, Ontario and other jurisdictions have

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[59] Much of the following material is drawn from Dunlop Book, pp. 60-66.

[60] See Humberstone v. Trelle (1910), 14 W.L.R. 145 (Alta. T.D.); Lineham v. McNeill, [1917] 1 W.W.R. 400 (Alta. C.A.); Ramsay v. Rickard, [1935] 3 W.W.R. 559 (Alta. C.A.). The Ontario courts take the opposite view. See e.g., Schipper v. Linkon Co., [1957] O.W.N. 481.

> enacted the opposite common law position that the setting down of an appeal automatically stays execution unless otherwise ordered.[61]

2.46 Alberta falls into the first category. As to the Court of Queen's Bench, Rule 508 of the Alberta Rules of Court provides:

> 508 An appeal does not operate as a stay of execution or of proceedings under the decision appealed from except so far as a judge of the Court of Queen's Bench or the Court of Appeal may order and no intermediate act or proceeding is invalidated except so far as the court appealed from may direct.

The position is the same for the Small Claims Division of the Provincial Court. Section 58 of the Provincial Court Act[62] sets out the right of appeal. Section 61 is as follows:

> 61 Notwithstanding anything in this Part, an appeal does not operate as a stay of proceedings under the judgment being appealed except as ordered by the Court of Queen's Bench.

2.47 It will be noted that an application for a stay under Rule 508 can be taken to a judge of either the Court of Queen's Bench or the Court of Appeal. However an application under section 61 must go to the Court of Queen's Bench. A Provincial Court judge has no jurisdiction to order a stay, at least as far as section 61 is concerned.

2.48 There is a substantial body of law on the court's discretion to grant a stay. The general position is that a successful litigant should not be deprived of the fruits of the litigation unless special circumstances exist. A stay will be granted where the effect of execution would be to render a successful appeal a barren victory or deprive the appellant of the means to appeal, or where the respondent is unlikely to repay the appellant if the latter is successful.

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[61] Dunlop Book, p. 62.

[62] R.S.A. 1980, c. P-20.

2.49 There are two legislative provisions which empower the courts to grant a stay order in circumstances other than an appeal situation. Section 18(1)(a) of the Judicature Act has been reproduced above at paragraph 2.37. The other provision is Rule 346(2) which says:

> (2) The court may, at or after the time judgment is given, stay execution or may remove or extend any stay already granted.

Rule 346(2), like some of the other legislation referred to, uses the word "execution", leading to the possibility that the Rule does not empower the court to stay attachment of debts or other remedial processes which are different from execution in the narrow sense.[63]

2.50 The courts may attach terms or conditions to a stay of execution order. Recent cases have used the power to require a defendant who obtains a stay order pending appeal to invest money in the amount of the judgment in an interest bearing account. The goal is a desirable one, bearing in mind the "derisory"[64]

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[63] See Fellows v. Thornton (1884), 14 Q.B.D. 335 (D.C.); Capla v. Caird, [1944] 1 W.W.R. 569 (B.C. Co. Ct.); Taylor v. Silver Giant Mines Ltd. (1952), 7 W.W.R. (N.S.) 624 (B.C.S.C.).

[64] Cf. Getz, "More About Pre-judgment Interest" (1976), 34 The Advocate 121.

5% interest rate on judgments established by the Interest Act.[65] However there is some dispute about the propriety of such a strategy which circumvents the Interest Act under the guise of attaching a condition to a stay of execution order.[66]

(3) Bankruptcy and Consolidation Orders

2.51 A debtor may assign into bankruptcy or may be petitioned into bankruptcy by his or her creditors. The debtor may also make a proposal to the creditors under sections 32-46 of the Bankruptcy Act.[67] In any of these events, the remedies of unsecured creditors are stayed. Section 49(1) of the Bankruptcy Act provides:

> 49(1) Upon the filing of a proposal made by an insolvent person or upon the bankruptcy of any debtor, no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property or shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy until the trustee has been discharged or until the proposal has been refused, unless with the leave of the court and on such terms as the court may impose.

Subsection 49(2) says that a secured creditor may realize upon the security, despite subsection 49(1).[68]

2.52 Another relevant group of sections in the Act is Part X, entitled "Orderly Payment of Debts". Houlden and Morawetz describe the purpose of Part X as follows:

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[65] R.S.C. 1970, c. I-18, s. 13.

[66] See Dunlop Book, pp. 64-65; Dunlop Supplement.

[67] R.S.C. 1970, c. B-3.

[68] There are other provisions of the Bankruptcy Act which somewhat modify the secured creditor's rights. See ss. 98-105.

> Part X is designed to provide a simple and inexpensive procedure whereby debtors, who are unable to meet their obligations as they come due, can apply to the clerk of the county or district court to fix amounts to be paid into court and distributed pro rata amongst creditors until they are paid in full.[69]

2.53 Legislation like Part X was enacted in Manitoba in 1932. Alberta also intended to enact such legislation but referred it first to the courts. The Supreme Court of Canada held it to be wholly ultra vires the province.[70] Part X was added to the Bankruptcy Act in 1966-67 and closely followed the provincial legislation which had been struck down. This part of the Act is in force only in those provinces, like Alberta, which have declared it to be in force.[71] Ontario has not opted into Part X, but has a somewhat similar consolidation order system in the Small Claims Courts.[72]

2.54 Part X permits a debtor to apply to the appropriate clerk of the court for a consolidation order.[73] If the order is granted, it will stay the issue of any process by a creditor who is bound by the order.[74] However the order does not apply to a variety of creditors[75] and will not prevent a secured creditor from enforcing the security.[76] The consolidation order says that the debtor must make regular payments into court[77] which will be distributed to participating creditors pro rata "or as nearly so as is practicable."[78]

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[69] Houlden and Morawetz, Bankruptcy Law of Canada (1984), vol. 1, p. L-9.

[70] Validity of the Orderly Payment of Debts Act, 1959 (Alta.), [1960] S.C.R. 571.

[71] Bankruptcy Act, R.S.C. 1970, c. B-3, s. 213.

[72] Small Claims Courts Act, R.S.O. 1980, c. 476, ss. 151-58.

[73] S. 190.

[74] S. 200.

2.55 Since 1975, the federal government has introduced into several sessions of Parliament versions of a new bankruptcy statute. In the most recent bankruptcy bill,[79] Part III replaces Part X of the present Act with a new system for arrangements by the consumer debtor with his or her creditors. Part IV of the bill deals with commercial arrangements. "The Bill, by creating a strong incentive to enter into an arrangement instead of bankruptcy, emphasizes debtor rehabilitation through better financial planning."[80]

2.56 Part III of the proposed bill would change Part X in several important respects. Part III can embrace a wider range of creditors, including in some circumstances secured creditors.[81] It contemplates an arrangement which would pay creditors only part of their debts and would discharge the remaining portion of their claims.[82] Like Part X, the arrangement under Part III acts as a bar to creditors exercising remedies.[83] If Bill C-17 is ever passed, Part III may become an important device for debtors to work out a compromise with their creditors which will prevent the free-for-all scramble under provincial law for the debtors' assets, while stopping short of forcing them into straight bankruptcy.

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[75] Several preferred and secured creditors are excluded by s. 189(2) and (3). Claims over $1000 are included only if the creditor consents. See s. 189(1).

[76] S. 203.

[77] S. 196(1).

[78] S. 206(2).

[79] Bankruptcy Act, 1984, Bill C-17, 1984 (32 Parl. 2nd Sess.). The bill did not become law.

[80] Background Papers for the Bankruptcy and Insolvency Bill (1979), p. 19.

[81] Bill C-17, ss. 77-78, 80.

f. Post-Judgment Remedies

(1) Introduction

2.57 Assuming that none of the protective devices described above are triggered, the judgment creditor is free to invoke any or all of the legal remedies available to collect the judgment from the debtor. Whether the creditor chooses to enforce the judgment is his or her choice, but no one will collect the judgment debt for the creditor. The freedom to choose is subject to two limitations: the creditor (1) cannot collect (and keep) more than the amount of the judgment and costs,[84] and (2) is subject to a shadowy and ill-defined duty not to abuse the court process in the pursuit of the debtor.[85]

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[82] Bill C-17, ss. 70, 85-86. An arrangement may be annulled upon the default of the debtor. See ss. 96-97.

[83] Bill C-17, s. 71.

[84] Clissold v. Cratchley, [1910] 2 K.B. 244 (C.A.). The rule is modified by the Execution Creditors Act, R.S.A. 1980, c. E-14 which impliedly permits a judgment creditor to seize or attach sufficient assets or debts to satisfy the claims of himself and of all other creditors entitled to share in the proceeds.

[85] See cases cited in Dunlop Book, pp. 145, 253-55.

2.58 In 1953, the Evershed Committee[86] described the English system of creditors' remedies in terms which apply to Alberta law today.

> Execution may be said to be a word to describe those steps by which a party who has judgment entered in his favour obtains the fruits of the judgment from the unsuccessful party. The first distinguishing feature of execution ... is undoubtedly that of self help. The Court, having entered judgment, takes no step to obtain for the judgment creditor the fruits of the judgment. It is left to the judgment creditor to decide which of many alternative steps he will take, and to take those steps at his own expense except in so far as he may later be able to recover such expense from the judgment debtor. The second distinguishing feature is that the system of execution ... is not a planned system. Like many of our institutions it has grown up haphazardly and has been altered from time to time to meet such needs as seemed to arise. It is a structure of some complexity, and much of it exists only in its present form for historical reasons.[87]

2.59 In the rest of this chapter, we will review the remedies available to a judgment creditor in Alberta. The two commonly used processes are execution (defined narrowly to mean the writ of execution) and the garnishee summons. We will also look at more unusual remedies, and will conclude with an estimate, drawn from our empirical study, of the system's success at collecting money for the creditor.

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[86] Final Report of the Committee on Supreme Court Practice (1953), Cmnd. 8878.

[87] Ibid., p. 126. The Committee's expansive use of the term "execution" is not universally accepted. See Dunlop Book, pp. 138-41.

(2) The Writ of Execution

(a) Nature of Writ: Its Issue

2.60 The writ of execution is the old English writ of *fieri facias* (or fi fa), imported into Alberta law by the North-West Territories Act[88] and modified by several Alberta statutes and by the Alberta Rules of Court. Rule 346 provides that "every judgment creditor is entitled immediately to issue one or more writs of *fieri facias*."[89] The writ of execution is therefore a post-judgment remedy.

> In order to issue a writ the creditor must have first obtained a judgment against his debtor which directs the payment of a sum of money which is immediately due and owing. It is also clear that once a judgment has been satisfied it ceases to have any force and effect, and any writ of execution issued on such a judgment is void *ab initio*.[90]

2.61 This general rule may be subject to one anomalous exception. Where a default judgment is obtained and a writ of execution is issued, the judgment may later be set aside pursuant to Rule 158. What happens to the writ?[91] If the above statement of law is correct, one might assume that the writ would fall with the judgment, but there are reported decisions where writs have been ordered to remain in place, despite the setting aside of the judgment.[92]

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[88] 49 Vict., c. 25, s. 3 (Can.). See Côté, "The Reception of English Law" (1977), 15 Alta. L. Rev. 29, 90.

[89] The legislation and the case law use "writ of *fieri facias*" and "writ of execution" indiscriminately.

[90] Dunlop Book, p. 141.

[91] The problem can also arise where the creditor has issued a garnishee summons after judgment.

2.62 Our empirical research[93] located nine cases where judgments were granted, writs of execution issued, and the judgments were subsequently set aside. In four of these cases, the order setting aside the judgment expressly said that the writ would also be set aside. In the other five, the order made no reference to the writ. No orders were found which expressly preserved the writ or other enforcement remedy.

2.63 Rule 346 may permit a writ of execution to be issued once judgment is pronounced without waiting for it to be entered, unless the judgment is conditional. The judgment creditor need not make a demand of payment or serve the judgment on the debtor before issuing execution, subject to a possible argument of abuse of process.[94]

2.64 Rule 347 provides that "every writ of *fieri facias* shall be issued against both the goods and lands of the debtor." The rule was probably intended to reverse the old Ontario practice of issuing two writs of *fi fa*, one against goods and one against land. However it has another more significant function in that it is the closest one can come to an express statement in Alberta legislation that land is exigible.

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[92] See e.g., *C.I.B.C.* v. *Sheahen* (1978), 22 O.R. (2d) 686 (Div. Ct.); *Larnu Distributors (1970) Ltd*. v. *Brochu* (1980), 26 A.R. 373; but cp. *Jet Power Credit Union Ltd*. v. *McInally* (1973), 17 O.R. (2d) 59. For critical comment, see Springman, "Case Comment" (1982), 3 Advocates' Quarterly 365; Sims, "The Writ of Execution and the Garnishee Summons," in Legal Education Society of Alberta, *Dealings between Creditor and Debtor* (1982), pp. 5G-6G.

[93] Dunlop Report, paras. 9.4-9.5.

[94] See Dunlop Book, p. 145.

2.65 Such an enactment is necessary to reverse the common law immunity of land from execution. Section 122 of the Land Titles Act[85] speaks of the binding effect of the writ, once filed in a land titles office, but it does not expressly say that land is exigible. Rule 347, like many of the rules of court relevant to creditors' remedies, is a rule of substantive law which depends for its validity on section 47 of the Judicature Act,[86] the rule having been promulgated before Nov. 4, 1976.[87]

2.66 The Dunlop empirical study isolated a large sample of non-matrimonial money judgments, and then examined whether or how they were enforced.[88] Enforcement was defined to include the issue of a garnishee summons or the issue of a writ of execution, even where the latter had not been filed in the sheriff's office.[89] Given this expansive definition of enforcement, it was found that 352 judgments (over 15% of the sample) were not followed by any attempt at enforcement, at least through the courts.

2.67 In some of these cases, the judgment debtor may have paid the creditor directly, without record of the payment being noted in the clerk's file. In others, one suspects that the creditor simply abandoned hope of collecting anything. In still other cases, the judgment creditor may have continued to try to collect the debt by telephone calls and letters but without incurring the expense and difficulties of execution or garnishment.

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[85] R.S.A. 1980, c. L-5.

[86] R.S.A. 1980, c. J-1.

[87] For the background to this curious section, see Institute of Law Research and Reform, Report No. 15: Validity of the Alberta Rules of Court (1974).

[88] Dunlop Report, c. 3.

[89] No judgments were found which were enforced only by the commencement of a process other than execution or garnishment.

2.68 The creditors' remedies system may be likened to a funnel or, more accurately, to a series of filters.[100] A large number of statements of claim are filed, fewer judgments are obtained, still fewer writs of execution are issued and so on down to the comparative handful of creditors who actually press on to seizure and sale. Some creditors drop out of the process because they have been paid. Others, who have perhaps learned more about the debtor since issuing their statements of claim, give up any further attempt to collect the judgment. The funnel shape of the creditors' remedies system is ambiguous as to success or failure. We will later give a partial answer to the question whether the system succeeds in collecting debts for litigants.

2.69 The Dunlop study did not identify the type of business engaged in by each creditor, the kind of debt involved or whether the parties to the litigation could be labelled as personal or commercial. Ramsay did classify his sample according to the creditor's business and the type of transaction.[101] He found that the heaviest users of garnishment, accounting for 44% of the sample, were retail creditors and finance companies. Individuals launched 10% of the garnishment proceedings, but one-half of these cases involved automobile damages litigation or business debts. The Scottish Law Commission research found that, in the vast majority of actions in which enforcement measures are taken, the pursuers (or plaintiffs) were commercial enterprises. The Scottish researchers also noted some variation in the use of creditors' remedies between different types of creditors.[102] Most defenders (i.e., defendants) in summary debt actions were personal (that is, "named individuals or married couples").[103]

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[100] The image is drawn from the Scottish Law Commission, Scot. Memo 47, pp. 20-24, 132-43; Scot. R.R. #1, pp. 7-9; Scot. R.R. #6, pp. 29-56; Scot. R.R. #8, passim.

[101] Ramsay Report, pp. 50-53.

2.70 When the Dunlop report looked at the type of enforcement process used, it was found that the writ of execution was the remedy most commonly initiated by Alberta creditors.[104] In 1855 judgments (over 94% of the enforced judgments in the sample), a writ of execution was issued, either alone or with a garnishee summons. In only 691 of the enforced judgments (35.2%) was a garnishee summons issued. In 109 of the enforced judgments (5.6%), a garnishee summons was issued without a writ.[105] As we shall see later, it does not follow that creditors more often pursue and complete the execution process than the garnishee process. Table 12 and Figure 1, drawn from the Dunlop Report, show the number of judgments enforced by writ of execution, garnishee summons or both.

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[102] See Scot. R.R. #1, pp. 12-18, 31; Scot. R.R. #2, pp. 6-8, 16; Scot. R.R. #3, pp. 10-16, 37-40, 42-43; Scot. R.R. #8, pp. 36-38.

[103] Scot. Memo. 47, pp. 137-38, 143-44. In ordinary court payment actions (that is, not summary cause payment actions), about one-half of the defenders were personal and one-half commercial. See also Parker, Procedural Alternatives for Enforcement of Debt Claims against Consumer Debtors in Canada (LL.M. thesis, York U., 1984) 88-91 (hereafter Parker).

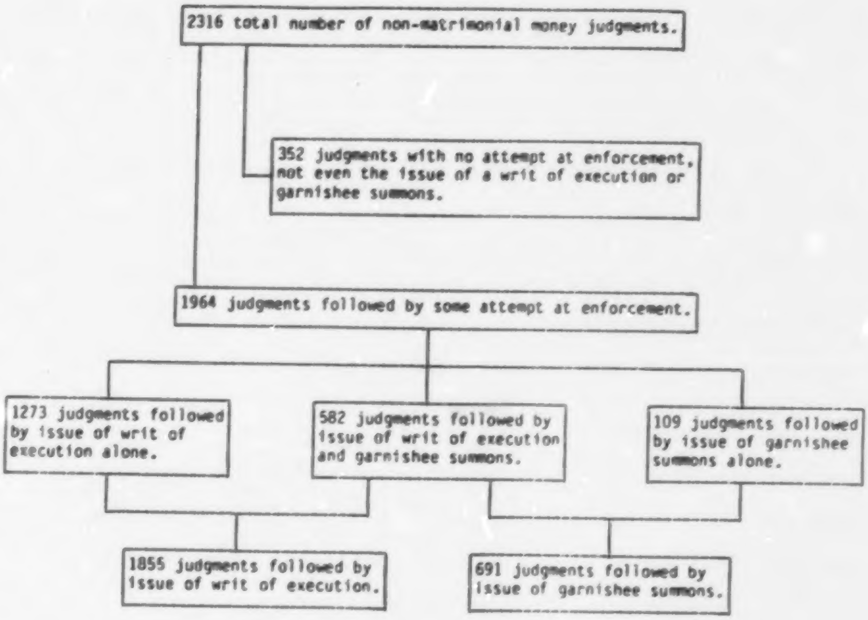
[104] Dunlop Report, c. 4.

[105] Cf. Ramsay Report, pp. 102-03.

Table 12 - Types of Enforcement in 1980 and 1981

		Enforced by Writ of Execution		
		Yes	No	Total
Enforced by garnishee Summons	Yes	582 (29.6)	109 (5.6)	691 (35.2)
	No	1273 (64.8)	0.0	1273 (64.8)
	Total	1855 (94.4)	109 (5.6)	1964 (100.0)

FIGURE 1. TYPES OF ENFORCEMENT IN 1980 AND 1981.


2316 total number of non-matrimonial money judgments.
352 judgments with no attempt at enforcement, not even the issue of a writ of execution or garnishee summons.
1964 judgments followed by some attempt at enforcement.
1273 judgments followed by issue of writ of execution alone.
582 judgments followed by issue of writ of execution and garnishee summons.
109 judgments followed by issue of garnishee summons alone.
1855 judgments followed by issue of writ of execution.
691 judgments followed by issue of garnishee summons.

2.71 When a writ of execution is issued, it is directed to the sheriff of a specific district.[106] Rule 346 permits a creditor to issue more than one writ of execution, and the common law appears to contemplate that multiple writs may be issued to the same sheriff or to sheriffs of different judicial districts.[107] The Dunlop empirical study found that 221 judgment creditors, or 12% of those who used the execution remedy, issued more than one writ of execution.[108]

2.72 Solicitors acting for creditors appear to issue multiple writs for at least two reasons:

(1) When the judgment is against two or more debtors, some solicitors issue separate writs for each judgment debtor. This was true in 9% of the multiple writ cases.

(2) Solicitors issue one original writ, usually directed to the sheriff of the judicial district in which the judgment was obtained, and an alias writ directed to the sheriff of another judicial district. This was the reason for the issue of more than one writ in 91% of the multiple writ cases.

2.73 A writ of execution may be enforced in two ways:

(1) The creditor may file the writ with the appropriate sheriff and instruct him or her to seize and sell property of the debtor.

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[106] Alberta Rules of Court, Schedule A, Form F.

[107] Dunlop Book, pp. 362-64.

[108] Dunlop Report, c. 5.

(2) After filing the writ with the sheriff, the creditor may register a certified copy of the writ in one or both of the land titles offices and then enforce the writ against the debtor's land. We will discuss below both of these methods of enforcement.

(b) The Sheriff, Seizure and Sale

2.74 The sheriff is the public officer responsible for carrying out the seizure and sale of property pursuant to a writ of execution. In England, the sheriff operates in theory as an independent contractor rather than a public servant, a model which was initially followed in the older Canadian provinces.

> Until comparatively recently, the sheriff in this country hired and fired his own staff, exercised independent discretion in the running of his office and was compensated in whole or in part by fees and disbursements paid by execution creditors or collected from the proceeds of seizure and sale....
>
> A sheriff was held to be civilly liable for any fraud or wrongful act or omission on the part of his bailiff, whether or not there was evidence of any recognition by the sheriff of the act or default complained of....
>
> The law has even gone so far as to hold the sheriff liable where the act done was contrary to the express terms of the writ or in disobedience to his express instructions, so long as it was done in the purported exercise of the officer's authority.[109]

2.75 Since the turn of the century, however, an important change in the nature of the sheriff's office has taken place. In most Canadian jurisdictions today, the independent contractor sheriff has been replaced by what may be called the civil service sheriff, i.e., an employee of the provincial government and a member of the public service.

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[109] Dunlop Book, p. 380.

> While [the sheriff] often has a say in the employment and promotion of his office staff, the actual hiring is done through the normal channels in the civil service. Sheriff and bailiff are thus both employees of the same master carrying out the tasks set down for them.[110]

2.76 As a result, an important change has taken place in the liability of the sheriff for the acts of the bailiffs.

> [T]he cases ... have held that a civil service sheriff is not liable for the acts of his bailiff unless the sheriff has been an active participant in the action complained of. No doubt the bailiff is personally liable, but it would be unfair to impose such liability vicariously on a sheriff who has no power to hire and fire and who is much more a fellow employee than an employer who has delegated a personal duty to a subordinate.[111]

A study prepared for the Law Reform Commission of British Columbia deplores this change and proposes that "serious thought be given to re-introducing the entrepreneur sheriff."[112]

2.77 Sheriffs and their officers are appointed by the provincial government pursuant to the Public Service Act,[113] a sheriff being appointed to each judicial district in Alberta. The sheriff's officers may be employees of the Crown or they may work as independent contractors. The latter officers, sometimes called fees bailiffs, are paid a certain fee for each file completed or returned and mileage costs.[114]

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[110] Ibid., p. 380.

[111] Ibid., p. 381. On the liability of the Crown for the actions of sheriffs or bailiffs, see Proceedings Against the Crown Act, R.S.A. 1980, c. P-18, s. 5(6).

[112] Turriff and Edinger, The Office of the Sheriff (1983), pp. 3, 232-42, hereafter Turriff and Edinger.

[113] R.S.A. 1980, c. P-31. See Court of Queen's Bench Act, R.S.A. 1980, c. C-29, ss. 15-17, 21.

2.78 We earlier said that a writ of execution issued in the clerk of the court's office may or may not be delivered to the appropriate sheriff. One would expect that most issued writs would be filed in the sheriff's office. One surprising result recorded in the Dunlop report is that 149 writ-holders (8.3% of all writs) chose not to take this simple step.[115]

2.79 A writ issued in the clerk's office but not delivered to the sheriff has no binding effect on the debtor's property and will not entitle the creditor to share in distributions under the Execution Creditors Act.[116] The cost of filing the writ with the sheriff is minimal.[117] Filing the writ with the sheriff need not result in the expense of seizure; in fact, many writ-holders take no action on their writs.

2.80 It may be that some debtors pay after judgment but before the writ goes to the sheriff, particularly if urged to do so by the creditor. Some judgment creditors may abandon hope at this stage, but it is hard to explain a decision not to take the final step necessary to trigger such rights as the creditor has, short of seizure and sale.[118]

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[114] See Dunlop Report, paras. 6.6-6.12.

[115] Dunlop Report, para. 6.32. Note that we considered only writs directed to the sheriff of the same judicial district as that where the judgment was obtained. Ibid., paras. 6.30-6.31.

[116] R.S.A. 1980, c. E-14.

[117] $2.00. Alberta Rules of Court, Schedule E.

2.81 If the judgment creditor files the writ in the appropriate sheriff's office, he or she has a choice whether or not to instruct the sheriff to seize and sell property of the debtor. Even if the creditor chooses not to instruct seizure, the filing of the writ with the sheriff improves the situation in two ways:

(1) A writ delivered to the sheriff binds the debtor's goods. Section 4 of the Seizures Act[119] provides:

> 4 A writ of execution from the delivery thereof for execution to a sheriff binds the goods of the judgment debtor situated within the judicial district of that sheriff, but not so as to prejudice the title to the goods acquired by any person in good faith and for valuable consideration, unless that person had at the time when he acquired his title notice that the writ had been delivered to the sheriff and remained in his hands unsatisfied.

The effect of section 4 is that the writ binds the goods[120] of the judgment debtor, whether or not seizure takes place, although seizure probably closes the bona fide purchaser loophole.[121]

(2) The holder of a writ which is filed in the sheriff's office and kept up to date by the annual filing of payment

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[118] Seizures Act, R.S.A. 1980, c. S-11, s. 4.

[119] R.S.A. 1980, c. S-11.

[120] Personalty other than tangible goods will not be bound until actual seizure. See Dunlop Book, p. 147. For a fuller discussion of the present law regarding the binding effect of the writ, see infra, paras. 6.109-6.120.

[121] Dunlop Book, pp. 378-79; but cf. McGillivray, "A Problem Arising out of Section 4 of the Seizures Act" (1940-42), 4 Alta. L.Q. 77.

notices[122] is entitled to share pari passu in the proceeds of another creditor's execution or garnishment effected in the same judicial district. Section 2 of the Execution Creditors Act[123] provides:

> 2 Except in the cases where it is otherwise specifically provided by this Act, all property seized or attached by virtue of
>
> (a) a writ of execution,
>
> (b) a writ of attachment,
>
> (c) garnishee proceedings, or
>
> (d) proceedings in the nature of equitable execution,
>
> shall be deemed to have been attached on behalf of all creditors entitled by this Act to share in any money received by the sheriff by reason of the seizure or attachment.

The Act creates a system of distribution rules which will be considered below. For this purpose, the significance of the Act is that entitlement to share in a distribution turns, not on seizure, but on filing the writ and keeping it up to date.

2.82 Our empirical study found that 887 creditors, or 54% of those with writs filed with the sheriff, took no further action (except to file renewal statements) and received no money, so far as the sheriff's records show.[124] They may of course have been paid directly by their debtors, or they may have attached debts owing to the debtor which were paid into and out of court without passing through the hands of the sheriff.[125] However one suspects that many of these writ-holders simply abandoned hope and received nothing for their efforts (or lack of them).

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[122] Execution Creditors Act, R.S.A. 1980, c. E-14, ss. 28-29.

[123] R.S.A. 1980, c. E-14.

[124] Dunlop Report, paras. 6.34-6.42.

[125] Pursuant to the Alberta Rules of Court, r. 480.

2.83 Some execution creditors do instruct the sheriff to seize and sell property of the debtor. The practice is that a creditor, on or after filing the writ with the sheriff, may instruct that a seizure be carried out.[126] Upon receipt of such instructions, the sheriff will issue a warrant to an officer or bailiff authorizing him or her to conduct the seizure. The officer will attempt seizure, and then prepare a report indicating what was done.

2.84 An initial problem is to ascertain what assets the debtor has. The sheriff is in theory responsible to search out the assets of the debtor in the bailiwick.[127] In practice, the sheriff looks to the creditor for instructions as to what should be seized. This is not unreasonable because it is the execution creditor, not the sheriff, who has the right to conduct an examination in aid, i.e., to examine the execution debtor and others as to the debtor's assets.[128]

2.85 Dunlop found that the examination in aid was not commonly used by execution creditors.[129] Appointments were issued for only 137 (or 7.4%) of the judgments where writs had been issued. It was impossible to tell from the court files whether debtors had in fact appeared and been examined. Very few applications were made for an order to the debtor to appear or be committed, and there was only one case in the entire sample where a debtor was in fact committed.

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[126] Execution Creditors Act, R.S.A. 1980, c. E-14, s. 4.

[127] Dunlop Book, p. 384.

[128] Alberta Rules of Court, rr. 372-82.

[129] Dunlop Report, paras. 5.7-5.12.

2.86 Another constraint on the seizure process is that the property which the sheriff's officer seizes must be exigible, i.e., the law must permit it to be seized and sold. There are two broad limits on exigibility.

(1) The common law created severe constraints on what property of the debtor could be seized, and these limits have been only partially removed by English and Alberta legislation. There are still assets which are not exigible today because of the deficiencies of the law of execution or because they are accessible only by the use of another remedy, e.g., attachment of debts.[130]

(2) The Legislative Assembly has in many statutes, especially the Exemptions Act,[131] provided that certain assets which would otherwise be exigible are to be exempt from execution. The policy of these statutes is usually to preserve to the debtor the assets which are necessary to survival and which are needed for work. In 1978, the Institute published a working paper on exemptions,[132] and we will return to the subject later in this paper.

2.87 A more serious impediment to seizure is that some assets, while exigible, are difficult or impossible for the sheriff to sell or otherwise realize upon. The common law of executions was designed to effect the seizure of tangible goods which could then be sold. The law works well as to choses in possession, assuming that they fetch anything like their true value on a sheriff's sale.[133] The law is much less effective when the asset to be seized is a chose in action. For example, serious problems beset the sheriff who wishes to seize and realize upon a share in a non-distributing corporation, a registered retirement savings plan, or the vendor's interest under a conditional sales agreement.

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[130] Dunlop Book, pp. 149-61.

[131] R.S.A. 1980, c. E-15.

[132] Institute of Law Research and Reform, Exemptions from Execution and Wage Garnishment (1978), hereafter Exemptions Working Paper.

2.88 In the case of the share, the problem will be to find a buyer, because the corporation may refuse to register the purchaser from the sheriff as the shareholder.[134] In the cases of the R.R.S.P. and the conditional sales agreement, the problem is that the sheriff may not want to sell the assets at all. As to the R.R.S.P., it may be preferable to terminate the plan and take the money. The sheriff may want to retain the conditional sales agreement and collect the payments. However, the power to terminate the R.R.S.P. or to retain the conditional sales agreement is doubtful; at common law, the sheriff's duty was to seize and sell, and modern statutes have done little to change the position.[135]

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[133] The evidence from other jurisdictions is that they do not. See Trebilcock and Shulman, pp. 415, 441-45.

[134] Dunlop Book, pp. 165-69; contra, Associates Finance Co. Ltd. v. Webber, [1972] 4 W.W.R. 131 (B.C.S.C.).

[135] Cf. Springman and Gertner, "Enforcement Against RRSPs and RRSP Assets by Unsecured Creditors" (1983), 4 Advocates Quarterly 450.

2.89 At one time in the history of the English law of execution, the courts were prepared to overcome the deficiencies of fi fa by developing other remedies.[136] These innovations have now fallen into disfavour,[137] with the result that many assets, while technically exigible, are for practical purposes outside the reach of provincial creditors' remedies. One result may be to encourage creditors to petition debtors into bankruptcy because of the more expansive powers of the trustee.

2.90 The actual process of seizure is complex, involving common law rules overlaid with statutory modifications.[138] The concept is described by Halsbury as follows:

> An entry upon the premises on which the goods are situate, together with an intimation of an intention to seize the goods, will amount to a valid seizure, even where the premises are extensive and the property seized widely scattered, but some act must be done sufficient to intimate to the judgment debtor or his employees that a seizure has been made, and it is not sufficient to enter upon the premises and demand the debt.[139]

Whether or not a seizure has been effected or abandoned is always a question of fact. It is now common that seized goods are left with the debtor or a responsible person in the home on the undertaking that they will be given back to the bailiff on demand.

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[136] Especially equitable execution.

[137] See e.g., Fox v. Peterson Livestock Ltd. (1982), 17 Alta. L.R. (2d) 311 (C.A.).

[138] For a description of the present law, see Dunlop Book, pp. 373-78.

[139] 17 Hals. (4th) "Execution", para. 489.

2.91 The common law rules regarding seizure and abandonment were developed at a time when the law permitted the sheriff to seize only tangible goods and chattels. When the reforming legislation of the nineteenth century[140] expanded the scope of the writ of execution to include some choses in action, the concept of seizure was similarly modified, sometimes by statute and sometimes by judicial legislation. The Seizures Act[141] creates special procedures for seizing shares,[142] mortgages,[143] and growing crops and livestock.[144]

2.92 The Act goes further and creates an extensive set of provisions regarding seizure.[145] Two recent cases[146] have said that these provisions only add to the common law requirements for seizure but do not replace them. Both sets of requirements must still be adhered to.[147]

2.93 Baron Parke in the leading case of Gawlor v. Chaplin said that "the duty of the sheriff is confined to seizing goods that would be reasonably sufficient, if sold, to pay the sum indorsed on the writ -- that is, the debt, interest upon the debt, poundage, and expenses; and if the sheriff seizes more, prima facie he is a wrongdoer".[148] One assumes that, as a result of the Execution Creditors Act,[149] the sheriff's duty is to seize sufficient property to pay all writs properly filed and entitled to share. Subject to this modification, Baron Parke's rule imposes a difficult task on the sheriff who must try to stand impartial between debtor and creditor.

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[140] Judgments Act, 1838 (1 & 2 Vict.), c. 110.

[141] R.S.A. 1980, c. S-11.

[142] S. 7.

[143] S. 8.

[144] Ss. 10-13.

[145] See ss. 16-17, 23-37.

[146] R. v. Vroom, [1975] 4 W.W.R. 113 (Alta. C.A.); Pacific Finance Acceptance Co. v. Corbett (1977), 1 Alta. L.R. (2d) 351 (D.C.).

[147] Although note the comment of Clement J.A. (dissenting) in R. v. Vroom, supra, note 146, p. 121, that the sheriff's compliance with s. 25(1) of the Seizures Act "must be strong prima facie evidence that a legal seizure has been made".

2.94 The courts have developed a large and complex body of rules as to the sheriff's limited rights to break into a debtor's home or other building to seize goods.[150] Section 23 of the Seizures Act[151] empowers the person charged with the duty to execute a writ to break open the door of any building other than a private dwelling house in which goods liable to seizure are contained. On the order of the court, such a person may similarly break open the door of a private dwelling house.[152]

2.95 Despite the obstacles described above, some writ-holders do instruct seizure[153] and sale. The researchers in the Dunlop study counted the number of warrants of seizure and then recorded which were successful and which were not.[154] Success for this purpose means that property of the debtor was seized. They then worked out the number of warrants (successful or not) as a percent of the total number of writs filed with the sheriff. This course of action is somewhat misleading because more than one warrant was issued for some writs. If they had recorded the number of writs for which warrants were issued, the percentages would have been slightly smaller. However the results are still fairly accurate as a guide to the success of the execution procedure.

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[148] Gawlor v. Chaplin (1848), 154 E.R. 590, 592.

[149] R.S.A. 1980, c. E-14.

[150] See Dunlop Book, pp. 388-91.

[151] R.S.A. 1980, c. S-11.

[152] See also s. 24 on seizure of mobile homes.

[153] Again, a notion appropriate to execution against tangible goods, but less so for choses in action.

[154] Dunlop Report, paras. 6.43-6.48.

2.96 Only 409 writs (or one-quarter of the writs filed in the three sheriffs' offices) were followed by an attempted seizure, and in only 172 cases (10.5%) was the seizure successful. In other words, 1230 writ-holders (75% of those who filed their writs with the sheriff) elected not to instruct seizure, a result which is not particularly surprising. It is also not surprising that 237 warrants (57.9% of total warrants) resulted in no seizure. Many debtors who permit writs to be filed against them have little or nothing in the way of valuable exigible assets.

2.97 The relatively poor results of attempted seizures may be explained by another factor: the functioning of the sheriffs' offices and the approach of some sheriffs' officers to their jobs. The researchers in our empirical study were, among other duties, asked to accompany some officers as they did their work in order to get an impression of the way that the execution process was carried out. The researchers watched and questioned several officers in all three judicial districts in an attempt to understand the impact which the officers have on the operation of the execution remedy. Their observations and conclusions are recorded in chapter 6 of the Dunlop Report. The researchers were not professional social scientists, and their observations are by no means systematic or complete. However it is still useful to record their general view that, in 1982 and 1983, a judgment creditor might have difficulty executing on a judgment because of the structure of the sheriffs' offices and the training and attitude of the sheriff's officer who was responsible for the file. This was so despite the fact that the creditor had acted bona fide and had receivsd a valid judgment and writ of execution from a court with jurisdiction to grant the relief.

2.98 The data in the Dunlop Report was collected in 1982 and 1983, and our conclusions about the sheriffs' offices were, we think, fair assessments as of those dates. As a result of the publication of the Report, we have received some comments suggesting that changes have been made in the operation of the sheriffs' offices in Alberta. We have not had a chance to look into those changes before publishing this report for discussion. We will be consulting fully before publishing our final report. We invite comment on the operation of the sheriffs' offices.

2.99 We looked at a number of other aspects of the seizure and sale process.[155] Some highlights may be noted briefly:

(1) In nearly two-thirds of the successful seizures (120 cases), the asset seized was a motor vehicle.

(2) In 53% of seizures (91 cases), the goods seized were left with the debtor or a member of the family on a bailee's undertaking.[156] In another 12% (21 cases), the goods were left

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[155] Dunlop Report, c. 6.

[156] This practice increases the danger of the debtor selling goods under seizure to a third person, thus creating

with a third party as bailee.

(3) In over half of the cases where goods were seized (97 cases), notices of objection were filed, but orders for removal and sale were obtained in only 39 cases (less than 23%).

(4) In 21 cases (about 12% of the cases where assets were seized), they were sold by the sheriff. As a percentage of the total number of cases where writs were filed with the sheriff, the figure is considerably lower, at 1.3%.

(5) Our empirical research uncovered several interesting differences in the operation of the execution process in the three judicial districts. These differences are noted at various points in chapter 6 of the Dunlop report.

2.100 When the statistics collected in the sheriffs' offices were pulled together, they demonstrated clearly the funnel shape of the creditors' remedies system in which large numbers of creditors start in the process but relatively few stay to the end. Table 28, reproduced from chapter 6 of the Dunlop report, began with the total number of judgments where writs were issued directed to the sheriff of the same judicial district as that in which the judgment was obtained. The judgment creditors in the sample were free to take a series of steps, leading to seizure and sale. As Table 28 and Figure 2 show, the numbers of creditors became progressively smaller at each step of the process.

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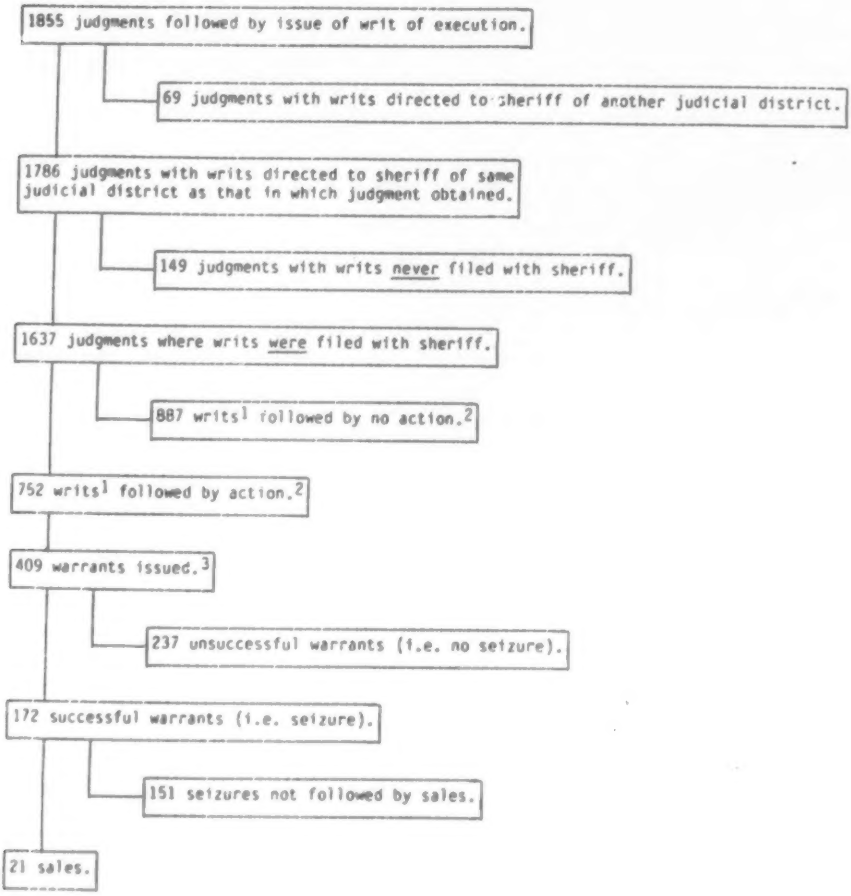
[158](cont'd) potential battles between the purchaser and the sheriff.

Table 28 - Summary of Sheriffs' Office Figures for 1980 and 1981 - All Districts

	Number	Percent
Judgments with writs directed to sheriff of same judicial district as that in which judgment obtained (Table 19)	1786	100.0
Judgments with writs directed to and filed with sheriff of same judicial district (Table 20)	1637	91.7
Writs filed with sheriff in which some action was taken other than renewal of the writ (Table 22)	752	42.1
Writs filed with sheriff followed by warrant (Table 24)	409	22.9
Writs filed with sheriff followed by successful warrants (i.e., seizures) (Table 24)	172	9.6
Successful warrants (i.e., seizures) followed by:		
(i) Bailees' undertakings (Table 27)	112	6.3
(ii) Notices of objection (Table 27)	97	5.4
(iii) Applications for removal and sale orders (Table 27)	52	2.9
(iv) Orders for removal and sale (Table 27)	39	2.2
(v) Sales (Table 27)	21	1.2

FIGURE 2. ENFORCEMENT OF JUDGMENT BY EXECUTION IN 1980 AND 1981.


1855 judgments followed by issue of writ of execution.
69 judgments with writs directed to sheriff of another judicial district.
1786 judgments with writs directed to sheriff of same judicial district as that in which judgment obtained.
149 judgments with writs never filed with sheriff.
1637 judgments where writs were filed with sheriff.
887 writs[1] followed by no action.[2]
752 writs[1] followed by action.[2]
409 warrants issued.[3]
237 unsuccessful warrants (i.e. no seizure).
172 successful warrants (i.e. seizure).
151 seizures not followed by sales.
21 sales.

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[1] 887 writs and 752 writs add up to 1639 writs, not 1637. The reason is that, in two files, judgments were followed by two writs instead of one. The writs are counted separately from this line on.

[2] "Action" was defined broadly to include a warrant, discharge, satisfaction piece or other evidence in the sheriff's file of satisfaction or any other change. We did not regard the mere renewal of a writ as "action".

[3] In a fairly small number of cases, more than one warrant was issued on one writ.

2.101 The percentages in Table 28 were based on the total number of judgments where writs were issued directed to the sheriff of the same judicial district as that in which the judgment was obtained. If we had taken as our starting point a larger number, such as the 2316 enforced and unenforced judgments in our sample, the resulting percentages would have been even smaller.

2.102 In paragraph 2.70, we noted that the writ of execution is the process most commonly initiated by Alberta creditors. Our figures show that, for the years 1980 and 1981, 1855 judgments were followed by the issue of a writ of execution, while 691 judgments were enforced by a garnishee summons. When we take into account the funnel shape of the execution process displayed in Table 28, we see that substantially fewer than 1855 writs were carried through the various stages of filing with the sheriff, seizure and sale. Many writs were issued, but substantially fewer were carried through to completion. We unfortunately do not know what percentage of issued garnishee summonses were actually served on the garnishee, the step which would amount to "completion" of that process. It is therefore not possible to compare the processes as to completion rates.

2.103 Before leaving the sheriff's office, an issue should be raised about the sheriff's sale of seized goods. It is often said that the sheriff's sale appears almost calculated to produce as little money as possible for the creditor.[157] Goods are sold by public auction, private tender or (upon a judge's order) by ordinary advertisement. No matter what method of sale is used, the purchaser from the sheriff has no guarantee that he or she will get title.[158] One might expect that prices paid at sheriffs' sales would be lower than the normal market value.[159] However sheriffs of considerable experience advise us that, on the average, the sheriff (or the auctioneer) will get as good a price for goods as the debtor would obtain on a private sale. We invite comments on the effectiveness of the sheriff's sale.[160]

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[157] See Dunlop Book, pp. 397-404.

(c) Filing the Writ in the Land Titles Office

2.104 Section 122 of the Land Titles Act[161] provides another method for enforcing a writ of execution. Subsections 1 and 2 of that section are as follows:

> 122 (1) The Registrar may register a copy of a subsisting execution or other writ affecting land if the copy is certified by the sheriff under his hand and seal of office.
>
> (2) On and after the receipt by the Registrar of the copy of the writ,
>
> (a) all legal and equitable interests of the execution debtor in any land there or thereafter registered in his name and including his interest, if any, as an unpaid vendor of the land, are bound by the execution, and

---

[158] See section 36 of the Seizures Act, R.S.A. 1980, c. S-11:

> 36 On the sale by the sheriff of goods pursuant to a writ of execution or a distress, the sale shall be without warranty of title and the purchaser, on paying the purchase price, thereby acquires the precise interest and no more in the goods that are so sold and that are lawfully sold under execution or distress, as the case may be.

[159] Studies in other jurisdictions have come to this conclusion. See Trebilcock and Shulman, pp. 441-45.

[160] See infra, c. 6, paras. 6.179-6.180; c. 7, para. 7.1, rec. 44.

[161] R.S.A. 1980, c. L-5.

> (b) no certificate of title shall be granted and no transfer, mortgage, encumbrance, lease or other instrument executed by the execution debtor of the land is effectual except subject to the rights of the execution creditor under the writ while it is legally in force,
>
> and the Registrar, on granting a certificate of title and on registering any transfer, mortgage or other instrument executed by the debtor affecting the land, shall, by memorandum on the certificate of title in the register and on the duplicate issued by him, express that the certificate, transfer, mortgage, or other instrument is subject to those rights.

2.105 The procedure is that the execution creditor files the writ with the sheriff to whom it is directed and the sheriff certifies a copy of the writ. The creditor then takes the certified copy of the writ to be filed at the Alberta land titles office or offices for the registration district or districts where it is thought that the execution debtor has land. The writ is almost always filed in the general register against the name of the execution debtor.[162] Section 122(3) of the Land Titles Act provides that a writ so filed ceases to bind or affect land at the expiration of six years from the date of filing, unless renewed. Writs will therefore remain in the general register until the expiry of six years unless the land titles registrar is informed that the writ has expired or has been discharged, satisfied or withdrawn.[163] On receipt of such information, the practice of the land titles offices is to remove the writ from the general (or "live") register to a "discharged writ" register.

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[162] Land Titles Act, R.S.A. 1980, c. L-5, s. 17(3).

[163] Cf. Land Titles Act, R.S.A. 1980, c. L-5, s. 123.

2.106 Subsection 122(2) says that the writ filed in the land titles office binds "all legal and equitable interests of the execution debtor in any land there or thereafter registered in his name" including his interest as an unpaid vendor of land.[164] Despite the sweeping wording, there are some interests in land, such as the interest of a purchaser under an agreement for sale,[165] which may not be caught by the writ. The Exemptions Act[166] applies to realty and creates problems for the creditor and others.[167] Unregistered interests in land cannot be caught under section 122, although it may be that a caveat can be filed against such interests under section 130.[168]

2.107 As to those interests in land included in the scope of section 122, they are said to be "bound by the execution,"[169] with the result that the execution debtor cannot sell or mortgage the land except subject to the writ.[170] The latter consequence is of importance to purchasers or mortgagees of land who seek to register their documents only to find a writ against a name similar to that of the vendor or mortgagor. Lawyers often complain of the problems caused by writs, especially where the other party to the conveyance is named Smith or Jones. There are cases in which the courts have attempted, not always properly, to relieve against the consequences of an inconvenient writ.[171]

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[164] There are interests in land which are specifically said to be exigible under the Seizures Act, R.S.A. 1980, c. S-11. See ss. 5 (leasehold interests) and 8 (mortgages). The relationship of those sections to the Land Titles Act is unclear.

[165] See Foss v. Sterling Loan (1915), 8 W.W.R. 569, aff. 8 W.W.R. 1092 (Sask. S.C. en banc); Kimniak v. Anderson, [1929] 2 D.L.R 904 (Ont. C.A.).

[166] R.S.A. 1980, c. E-15, s. 1(1)(j), (k), (l).

[167] McNeil v. Martin (1982), 23 Alta. L.R. (2d) 318, 328-29 (C.A.); Westhill Leasing Corp. Ltd. v. Rideout (1983), 25 Alta. L.R. (2d) 229.

[168] See Proskurniak v. Sawchuk (1960), 27 D.L.R. (2d) 768 (Alta. T.D.); Heiden v. Huck, [1971] 5 W.W.R. 446 (Alta. T.D.); Ogilvie-Five Roses Sales Ltd. v. Hawkins (1979), 9 Alta. L.R. (2d) 271. See also T.D. Bank v. Saskatoon (1967), 60 W.W.R. 360 (Sask. Q.B.); T.D. Bank v. J.A. Poppleton and Sons Farms Ltd., [1982] 3 W.W.R. 477 (Sask. Q.B.).

[169] Subs. 122(a).

[170] Subs. 122(b). The binding effect of the writ has been

2.108 From the point of view of the creditor, however, the writ filed in the land titles office is a useful remedy. The creditor often does not know what land the debtor has in the absence of an index of Alberta land holdings by name of owner, and bearing in mind the apparent deficiencies of the examination in aid process.[172] The only way that the writ can be effective is for the legal system to permit its registration against the name of the debtor, thus catching all land held or to be held by him or her. Where the debtor seeks to sell or mortgage the land, the writ will be discovered and must be dealt with, usually by part or full payment.

2.109 Another virtue of the writ filed in the land titles office is that it operates automatically, without further effort by the creditor except to keep it renewed. It is possible for a

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[170] (cont'd) affected by the amendment of s. 122 and the addition of s. 122.1 to the Act in 1985. See Real Property Statutes Amendment Act, 1985, S.A. 1985, c. 48. The scope and intent of the 1985 amendments, especially s. 122.1, is by no means clear.

[171] *Nova Holdings Ltd.* v. *Western Factors Ltd.* (1965), 51 D.L.R. (2d) 235 (Alta. C.A.); *Bank of Montreal* v. *Windermere Developments Ltd.* (1983), 25 Alta. L.R.(2d) 91; cf. *Madison Development Corp. Ltd.* v. *Wardley Realty Ltd.* (1984), 32 Alta. L.R. (2d) 265.

[172] See *supra*, paras. 2.84-2.85.

creditor to take aggressive action and to seize[173] and sell the debtor's land. This process is seldom embarked upon and almost never carried through to completion.[174] Execution against land is a complicated, expensive and uncertain process,[175] and creditors avoid it for that reason.

2.110 The Dunlop empirical study found that about 1198 writ-holders (about two-thirds of creditors with writs) filed copies of those writs with a land titles office.[176] There was a substantial difference in rates of filing between the large district and the other two districts. 784 writ-holders in the large district (76.3%) filed their writs in a land titles office; the comparable figures for the medium and small districts were 260 writs (56.8%) and 154 writs (51.2%) respectively. The simple explanation may be that one of the two land titles offices is located in the major city in the large district. It is easier and cheaper for large district creditors to file than for their counterparts in the other districts. The result is that they use the land titles system more frequently.

2.111 Another explanation lies in the fact that the medium and small judicial districts are much smaller than the large district which contains a large city. A creditor in the two smaller districts is more likely to know whether the debtor has or is likely to acquire land, whereas the large district creditor may be tempted to file a writ in the land titles office on the off chance that the writ may catch something.

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[173] Assuming that this step is necessary in execution against land. See Westhill Leasing Corp. Ltd. v. Rideout, supra, note 167; Dunlop Book, pp. 408-11.

[174] In our empirical study, we found no evidence that land had been sold pursuant to a writ of execution. See Dunlop Report, c. 7.

[175] See annotation to Westhill Leasing Corp. Ltd. v. Rideout, supra, note 167.

[176] Dunlop Report, c. 7. Fewer than 2% of the creditors who filed writs in the land titles system filed in both land registration districts.

2.112 When we compared the percentages of writs filed in the land titles offices with those filed in the sheriffs' offices, we found that a substantially larger percentage of writs were filed with the sheriff in all three districts, especially in the medium and small districts. One possible interpretation of the data is that filing with the sheriff is preferred over filing with the land titles office, even when the land titles office is in the same city as the clerk's and sheriff's offices, as in the large district.

2.113 An explanation for the assumed preference is that a debtor is more likely to have exigible personalty or a garnishable debt than land. The odds are much greater that a writ filed with the sheriff will eventually attract a pro rata payment than that a writ in the land titles office will catch a debtor about to sell or mortgage Blackacre. In the highly unlikely event that the debtor's land should be seized and sold, the proceeds of the sale may have to be distributed under the Execution Creditors Act, although the point is by no means clear.[177]

2.114 However, it is also possible to read the data in an entirely different manner. The law requires a creditor who wishes to file a writ in the land titles office to file it first with the sheriff. If half of the creditors preferred the land titles office and half preferred the sheriff's office, there would be 100% registration with the sheriff and 50% registration in the land titles system. The bare figures thus say nothing about the preferences of creditors for one system or the other. Without interviewing all of the execution creditors in the sample, it is impossible to choose between the two interpretations of the data.

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[177] See annotation to Westhill Leasing Corp. Ltd. v. Rideout, supra, note 167, at p. 232.

(d) Conclusion

2.115 The Alberta law of execution is a confusing mixture of common law modified but not displaced by statutory glosses. The statutes themselves are not consistent with each other with the result that the lawyer is often hard-pressed to find clear answers to the most simple questions. The standard of statutory drafting is not particularly high,[178] and the dovetailing of the various provisions has too often been neglected.

2.116 Two examples may be instructive.

(1) The process of execution against personalty is organized around the division of the province into judicial districts, but the land titles system is based on the very different pattern of two land registration districts. The problem of meshing the two different schemes in the situation of execution against realty is explored by Master Funduk in Seel Mortgage Investment Corp. v. Tri-Dell James Construction Ltd.[179]

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[178] See the comments of Clement J.A. in Wilkinson Co. Ltd. v. Nemethy (1978), 7 Alta. L.R. (2d) 30 (C.A.).

[179] (1981), 32 A.R. 299.

(2) The limitation periods applicable to the execution process are sufficiently complicated and uncertain to form a trap for the unwary solicitor. The law has developed a variety of rules to govern the two basic questions: (1) how long after judgment can the creditor issue execution, and (2) what is the duration of a writ of execution, once issued? The Limitation of Actions Act,[180] the Execution Creditors Act,[181] the Land Titles Act[182] and the Rules of Court[183] all have something to say about the question of limitations which, above all others, should be the subject of simple, crystal-clear rules. A housecleaning is sorely needed.

(3) Attachment of Debts

(a) The Process

2.117 The attachment of debts process is much simpler than execution and can be explained more briefly. We have already commented on attachment before judgment and will not repeat that discussion.[184]

2.118 Attachment (or garnishment) of debts is a process whereby a creditor can attach debts owing to the debtor. The creditor obtains a court order that a third person who owes money to the debtor must pay that money into court. At common law, debts could not be seized pursuant to the writ of fi. fa., and it was not until 1854 that an attachment of debts remedy was made generally available to judgment creditors.[185]

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[180] R.S.A. 1980, c. L-15, s. 4(1)(f).

[181] R.S.A. 1980, c. E-14, ss. 28-29.

[182] R.S.A. 1980, c. L-5, s. 122.

[183] RR. 331, 355-56, 363-65.

[184] Supra, paras. 2.15-2.21.

2.119 In Alberta, there are four pieces of legislation which enable debts to be attached. They are the Alberta Rules of Court,[186] the Civil Service Garnishee Act,[187] the Domestic Relations Act[188] and the federal Garnishment, Attachment and Pension Diversion Act.[189] In this study, our principal concentration will be on the Rules of Court which apply to creditors generally. The other statutes are interesting by way of comparison.

2.120 The process of garnishment of debts after judgment is much more mechanical and easier to pursue than garnishment before judgment. The remedy is not restricted to any particular cause of action so long as the plaintiff has obtained "a judgment or order for the payment of money."[190] After judgment, there is no need to obtain leave of a court. There is an automatic right to issue a garnishee summons.

2.121 The summons must be accompanied by an affidavit which, among other things, must allege that "the proposed garnishee ... is indebted to the defendant or judgment debtor, or that monies are accruing due from the proposed garnishee to the defendant or judgment debtor."[191] There is a large body of law on the meaning of the words "indebted" and "accruing due."[192] We discuss the subject briefly in paragraphs 2.131-2.132.

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[185] Common Law Procedure Act, 1854 (17 and 18 Vict.), c. 125, ss. 60-67.

[186] RR. 470-84.

[187] R.S.A. 1980, c. C-11.

[188] R.S.A. 1980, c. D-37.

[189] 1980-81-82-83 (Can.), c. 100.

[190] Alberta Rules of Court, r. 470(2). Quaere whether the judgment or order has to be signed or entered.

2.122 Once the summons is issued, it must be served on the garnishee. Rule 471 provides that "service of the summons on the garnishee binds the debt, due or accruing due from the garnishee to the defendant or judgment debtor" referred to in the affidavit or so much as is necessary to satisfy the creditor's claim. There are many cases on the effect of a served garnishee summons as against secured and preferred creditors.[193]

2.123 On receipt of a garnishee summons, the garnishee has clear duties which are set out in Rule 475. He or she must either pay the right amount into court, or make one of the replies set out in the Rule. There is no other choice, such as doing nothing; the garnishee must either pay or reply. If neither is done, the creditor can get a judgment against the garnishee directly.[194]

2.124 Our empirical study found that creditors issue fewer garnishee summonses than writs of execution.[195] In 1855 judgments (94.4% of the judgments enforced by any means), a writ of execution was issued, either alone or with a garnishee summons. In 691 judgments (only 35.2% of the enforced judgments) was a garnishee summons issued. That figure was broken down into two components: (i) 582 garnishees issued with writs - 29.6%, and (ii) 109 garnishees issued without writs - 5.6%.

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[191] R. 470(3)(b).

[192] See Dunlop Book, pp. 234-43.

[193] See Dunlop Book, pp. 263-75.

[194] R. 475(4).

[195] Dunlop Report, c. 8.

2.125 One reason for this difference between the remedies is that a writ of execution can be issued and filed with the sheriff and the land titles office on the basis of relatively little knowledge of the debtor. To issue a garnishee summons, however, the creditor has to be able to swear the supporting affidavit which, among other things, must identify the proposed garnishee and state that he or she is indebted to the defendant or judgment debtor.

2.126 The garnishee summons is of no use unless served on the garnishee, unlike a writ of execution which can be filed in the sheriff's office or the land titles office, where it may trigger a payment to the creditor without further action on his part. Even if the garnishee pays money into court, it will have to be divided with other creditors holding valid writs in the appropriate sheriff's office.

2.127 Given the difficulties associated with the garnishee summons, one might ask why a creditor bothers to use it at all. One reason is that, if successful, the garnishee will catch money rather than assets which must be sold, often for a fraction of their true value. The more important factor may be that the garnishee is the only vehicle which can reach two assets which many debtors have: the salary and the bank account. If the creditor has enough information to go after these debts, it will often be worth the time and trouble to do so.

2.128 Our researchers were also interested in finding out what the garnishees in the sample did in response to the service of garnishee summonses, bearing in mind Rule 475 which requires that they pay or make one of the approved replies. The most interesting conclusion was that 576 of the garnishees in the sample (45.9%) resulted in neither payment nor a reply. Some of those garnishees may have been issued but not served. As to the rest, it is likely that many garnishees responded directly to the creditor (or persuaded the debtor to do so) and perhaps paid the creditor directly. Other garnishees may have responded verbally to the clerk's office which relayed the information to the creditor. In all of these cases except that of non-service of the garnishee summons, there was a breach of Rule 475, and the creditor could have applied for judgment against the garnishee under Rule 475(4). In fact, this step is rarely taken. Fewer than ten such orders against garnishees were found in the whole sample.

2.129 406 garnishees (32.4%) resulted in payment. As we shall see later, however, many of the payments were a small percentage of the claim of the garnishing creditor, and even they might have to be shared with other writ-holders pursuant to the Execution Creditors Act.

2.130 Another conclusion to be drawn from the research is that replies were filed by garnishees in 272 cases, or 21.7% of the garnishee summonses reviewed. To summarize, about 46% of the cases resulted in neither reply nor payment into court, 21.7% resulted in a reply but no payment, and about one-third resulted in payment.

(b) Debts Due or Accruing Due

(i) The General Rule

2.131 As we said in paragraph 2.121, service of a garnishee summons binds debts due or accruing due from the garnishee to the defendant or judgment debtor.[196] This aspect of the legislation has not changed markedly since the mid-nineteenth century, and imposes real limits on the assets available to garnishment today.

2.132 There are two elements which must be satisfied before an obligation is liable to garnishment. (1) The obligation must be a "debt", that is, an obligation to pay a sum certain or a sum readily reducible to a certainty.[197] A claim for unliquidated damages would clearly not be caught by a garnishee summons. (2) The debt must be "due or accruing due." The word "due", meaning owing or payable immediately, gives little difficulty. The phrase "accruing due" has proven more troublesome. A debt has been said to be accruing due where

(1) the debt and its payment are unconditional, except that time must pass before the debt is payable,[198]

(2) the debt and its payment are unconditional except for conditions which are matters of procedure and administration and which cannot affect the rights of third persons,[199] and

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[196] Alberta Rules of Court, r. 471(1). See also r. 470(3)(b).

[197] See Dunlop Book, pp. 15-20.

[198] *Vater* v. *Styles*, [1930] 2 W.W.R. 241 (B.C.C.A.); cf. *Provincial Treasurer of Alberta* v. *Hutterian Brethren Church of Smoky Lake* (1980), 12 Alta. L.R. (2d) 368 (C.A.).

[199] *Bel-Fran Invt. Ltd.* v. *Pantuity Holdings Ltd.*, [1975] 6 W.W.R. 374 (B.C.S.C.); cf. *Olinyk* v. *Olinyk*, [1975]

(3) the debt exists now unconditionally, but payment is deferred to the future and may be subject to conditions affecting the right to receive the money.[200]

There is Alberta authority which tends to support all three interpretations (which are inconsistent with each other).

(ii) Bank Accounts

2.133 The problem outlined above is particularly acute in the case of bank accounts, one of the principal targets of garnishee summonses.[201] Most bank accounts and term deposits are subject to conditions which are occasionally relied on to defeat a summons.[202] As a matter of policy it is hard to understand why a debtor should be able to defeat creditors by choosing one kind of bank account over another, although the interests of the bank must be carefully considered in legislating a solution to the problem.

2.134 The Alberta Court of Appeal has recently held that a joint bank account cannot be attached by the creditors of one of the joint depositors.[203] The result turns on the terms of the particular account, but it accords with the majority view in England and Canada. Again, it is difficult to see why a debtor

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[199](cont'd) W.W.D. 129 (Alta. T.D.).

[200] Sandy v. Yukon Construction Co. (1960), 33 W.W.R. 490 (Alta. C.A.).

[201] Close to 33% of the garnishee summonses in our sample (248 summonses) were against accounts in banks, credit unions, caisses or treasury branches.

[202] Provincial Treasurer of Alberta v. Hutterian Brethren Church of Smoky Lake, supra, note 198.

[203] Banff Park Savings and Credit Union Ltd. v. Rose (1982), 22 Alta. L.R. (2d) 81 (C.A.).

can protect assets from attachment by using a joint account, although any legislative solution would have to consider the rights of the other joint depositor.

(iii) Wages or Salary

2.135 In Alberta, the wages or salary of a debtor can be attached before or after judgment, subject to the exemptions provided in Rules 483-84.[204] The relevant provision is Rule 472 which reads:

> 472 For the purpose of garnishment, wages or salary are deemed to accrue due from day to day; but no employer shall be compelled to pay wages or salary or any part thereof otherwise than in accordance with the terms of the hiring.

The purpose of Rule 472 is to overcome the argument that no part of a monthly salary payment is due or accruing due until the entire month has been worked. The result is that a garnishee issued and served half-way through a pay period will catch one-half of the payment due at the end of the period,[205] although the employer will not have to pay the amount into court until the time when it would have to be paid to the employee, usually at the end of the period.

2.136 The major difficulty with wages or salary garnishment under the Alberta Rules of Court is that a new summons must be issued and served on the employer for each pay period, as close to the end of the period as possible. Income to be earned in future months is not a debt accruing due, unless the contract of employment specifically provides for payment for future pay periods, whether the employee works or not.[206] The result is that the creditor is forced to deluge the employer with bi-weekly or monthly garnishee summonses, to each of which the employer must respond. The Dunlop empirical study found a substantial number of judgments enforced by more than one wage garnishee, and most of these cases involved garnishees issued against the same employer.[207]

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[204] Exemptions against garnishment were reviewed in the Institute's Exemptions Working Paper.

[205] On the situation of a summons issued early but served late in a pay period, see Imperial Oil Ltd. v. Moore (1964), 49 W.W.R. 694 (Alta. D.C.).

2.137 The position of the employer in receipt of a wage garnishee is not an enviable one. It is necessary first to ascertain the gross wages accrued due at the date of service of the summons. The employer must then deduct from that figure (1) all or part of the appropriate exemption,[208] and (2) all or part of at least some of the deductions normally taken from the gross pay.[209] The calculation will vary depending on the day of the month when the summons is served. As compensation for his efforts, the garnishee is entitled to deduct the magnificent sum of $5.00.[210]

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[206] Dunlop Book, p. 256.

[207] Dunlop Report, paras. 8.11-8.27. In one file, the creditor had issued 12 wage garnishees, as well as other bank garnishees.

[208] Alberta Rules of Court, r. 483(2) *may* mean that only a portion of the exemption should be deducted where the summons catches only part of the income for a pay period.

[209] *Continental Guar. Corp. of Canada Ltd.* v. *Horodyske*, [1927] 1 W.W.R. 401 (Alta. D.C.); *Gray's Ltd.* v. *Mountview Const. Ltd.* (1966), 59 W.W.R. 58 (Alta. D.C.); *Household Finance Corp.* v. *Pennifold* (1979), 10 Alta. L.R. (2d) 240 (Q.B.).

[210] R. 477.

2.138 Faced with such a task in which the rules are less than clear, the employer may be tempted to cut his losses and fire the debtor. This solution is prohibited by section 102 of the Employment Standards Act[211] which provides:

> 102 No employer or other person shall dismiss, terminate, lay off or suspend an employee for the sole reason that garnishment proceedings are being or may be taken against an employee.

The section may have an educational effect on some employers, but it is drafted very narrowly and does not prevent an employer from putting pressure on an employee to settle the financial problem so that the garnishee summons need not be dealt with. The section would appear to afford little real protection where the employer either does not know the law or refuses to obey it.

2.139 A more radical solution to the problem of wage or salary garnishment would be to change the Alberta Rules of Court to provide for a continuing garnishee summons which, when served on the employer, will catch successive income payments until the debt is paid. The Domestic Relations Act provided for a continuing garnishee summons for disputes litigated under that statute,[212] and other jurisdictions[213] have extended the remedy to creditors generally. A private member's bill introduced into the Second Session of the 20th Legislature of Alberta[214] would have achieved this result, but the bill was not passed. We will consider the appropriateness of such a reform later in this report.

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[211] R.S.A. 1980, c. E-10.1.

[212] R.S.A. 1980, c. D-37, s. 29. We were told by one experienced domestic relations lawyer that judges are reluctant to give continuing garnishee orders under s. 29. See now Maintenance Enforcement Act, S.A. 1985, c. M-0.5, ss. 13-13.1.

[213] E.g., England, Nova Scotia, Prince Edward Island and the Yukon Territory.

[214] An Act to Amend the Execution Creditors Act, 1984 (Alta.), Bill 253.

2.140 Despite the deficiencies in the remedy, we found that wage or salary garnishment was the most common single type of garnishee summons issued by the creditors in our sample.[215] Income payments are more popular than bank accounts as a target, perhaps because it is easier to discover where a debtor works than where he or she banks. On the other hand, it should be recalled that garnishment as a whole is substantially less popular than the issue of a writ of execution, although more popular than the issue of a writ followed by instructions to seize.[216]

(4) Little-Used Remedies

2.141 There are creditors' remedies other than execution and garnishment, but they are very rarely used in Alberta practice. For the sake of completeness, we will briefly note three such processes. They are (1) the charging order under the Imperial Judgments Act of 1838,[217] (2) equitable execution and (3) the stop order.

(a) The Charging Order under the Judgments Act

2.142 Before 1838, neither shares nor government securities were exigible by *fieri facias*. One of the reforms effected by the Judgments Act of that year was to create the charging order remedy against these assets. The Judgments Act has been held to be part of Canadian law, except where repealed or amended by local legislation.[218] However we found no examples of the remedy in our empirical studies.[219]

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[215] Dunlop Report, paras. 8.15-8.19. 435 of the garnishee summonses in the sample (57.5%) were issued against wages.

[216] *Supra*, paras. 2.100-2.102.

[217] (1 & 2 Vict.), c. 110, s. 14. See also Judgments Act, 1840 (3 & 4 Vict.), c. 82.

2.143 The operation of the remedy has been described as follows:

> The charging order remedy created by s. 14 of the Judgments Act is available to creditors only after they have obtained judgment for an ascertained sum. Where the debtor owns outright or has an equitable interest in "any government stock, funds, or annuities, or any stock or shares of or in any public company in England", the creditor can apply to a judge to order that such assets stand charged with the payment of the judgment debt. If the court chooses to exercise its discretion at all, it will initially issue a charging order _nisi_. Later, if the debtor does not pay, an order absolute will go.[220]

2.144 The assets which may be charged by an order under section 14 can be divided into two classes.

> The first category, described as "government stock, funds, or annuities", encompasses securities held by members of the public in exchange for money loaned to the government and perhaps to a Crown corporation. There is some doubt whether the remedy, applied in the Canadian context, would embrace provincial or federal government securities or both.[221]

The second and more important category of assets is "any stock or shares of or in any public company in England." This formula has been held to be broad enough to include shares in any incorporated joint-stock company, whether public or private. The charging order remedy against shares would appear to be preserved expressly by subsection 7(9) of the Seizures Act.

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[218] See Dunlop Book, pp. 134-35, 163.

[219] Dunlop Report, para. 9.3.

[220] Dunlop Book, p. 162.

[221] _Loc. cit_.

2.145 It is possible that certain advantages accrue to the creditor who invokes this creaky Victorian antique.[222] However the paucity of cases in Alberta suggests that the remedy has been ignored and forgotten. The question to be considered later is whether this process should be completed by a recommendation for abolition.

(b) Equitable Execution

(i) Generally

2.146 Professor Dunlop summarizes the development of equitable execution in England as follows:

> The courts of equity became involved in the problem of creditors' remedies in two ways. First, Chancery itself frequently made decrees ordering the defendant to pay a sum of money to the plaintiff, and it became necessary to develop an adequate system for enforcing such decrees. Secondly, creditors who had gone to judgment at common law but had failed, because of the narrowness of *fi. fa.* and *elegit*, to collect their claims began at an early stage to ask for equity's assistance to reach the full range of the debtor's assets. At first, the courts of equity enforced their own decrees and aided the judgment creditor at common law by putting pressure directly on the person of the recalcitrant debtor. However, the threat

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[222] For example, the charging order holder may not have to share the assets subject to the order with other creditors entitled under the Execution Creditors Act, R.S.A. 1980, c. E-14.

> of imprisonment for contempt proved to be costly and inefficient in some cases and excessively coercive in others, and equity timidly began to move away from its exclusive reliance on a remedy in personam towards a variety of processes designed to reach the property of the debtor. Equity developed three major remedies, two of which remain significant today; they are, in order of their creation, sequestration, receivership and the charging order as an exercise of equitable execution.[223]

2.147 All three types of equitable execution became part of Canadian law and have been granted by Canadian courts.[224] It is necessary to say something about each process.

(ii) Sequestration

2.148 The sequestration remedy as it developed in England has been described as follows:

> The writ of sequestration was an order directed to four or more persons, nominated as commissioners, giving them authority to seize the personal property and the rents and profits of the real property of the judgment debtor. It was used whether the contempt was in failing to appear and answer the bill or in failing to obey the decree. Originally, property seized by the sequestrators was simply detained until he complied with the order in question. By 1750, however, equity was permitting sequestrators on final process (i.e., where sequestration had issued to enforce a decree) to sell sequestered property and to use the proceeds to pay the judgment creditor's claim. Originally, the only property available to sequestration was property involved in the suit, but the remedy was later extended to any property of the person in contempt, subject to certain limitations discussed below.[225]

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[223] Dunlop Book, pp. 278-79.

[224] Ibid., p. 292.

[225] Ibid., p. 279.

2.149 While sequestration is undoubtedly part of Canadian law, we were referred to only four Canadian cases in which the remedy was granted on behalf of an unsecured creditor.[226] It has been said to be a "costly" and "cumbrous" remedy, not to be extended beyond "the cases to which it is clearly applicable."[227] It is a prime candidate for abolition as a remedy for unsecured creditors.

(iii) Receivership

2.150 The appointment of a receiver is used in a variety of circumstances to enforce the rights of secured creditors or to preserve property pending litigation. We are concerned with the remedy only when it is sought and obtained by an unsecured creditor.

> The receiver is appointed by the court to receive the rents and profits of real estate or to get in and collect personal estate. Where the appointment of a receiver is an exercise of equitable execution, he will be empowered to sell the personalty and to distribute the proceeds and rents and profits of real estate to the judgment creditors. A peculiar advantage of receivership over sequestration and over the common law writs is that receivers can be appointed before judgment, sometimes on an ex parte motion, in cases where property might be dissipated before judgment.[228]

2.151 Receivership as an unsecured creditor's remedy is clearly part of Alberta law. Section 13(2) of the Judicature

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[226] Ibid., pp. 292-94.

[227] London and Canadian Loan and Agency Co. v. Merritt (1882), 32 U.C.C.P. 375, 383 (Ont. C.A.), per Osler J.

[228] Dunlop Book, p. 281.

Act[229] provides:

> 13(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

The section, modelled on section 25(8) of the English Judicature Act, 1873,[230] has been held not to broaden the court's jurisdiction to grant equitable execution, although it does eliminate some cumbersome procedural requirements.[231]

2.152 The Alberta Rules of Court contains rules relating to the appointment of a receiver.[232] We discussed earlier the peculiar remedy against the proceeds of an auction sale.[233] Rule 466 is of general application and provides:

> 466 Where an application is made for the appointment of a receiver by way of equitable execution, the court in determining whether it is just or convenient that the appointment be made shall have regard
>
> (a) to the amount of the debt claimed by the applicant,
>
> (b) to the amount which may probably be obtained by the receiver and

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[229] R.S.A. 1980, c. J-1.

[230] Supreme Court of Judicature Act, 1873 (36 & 37 Vict.), c. 66.

[231] Fox v. Peterson Livestock Ltd. (1982), 17 Alta. L.R. (2d) 311 (C.A.); but see the opposite reading of the English provision in Mareva Campania Naviera S.A. v. Int. Bulk Carriers S.A., [1980] 1 All E.R. 213, 215 (C.A.) and Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2.

[232] RR. 463-66.

[233] R. 465. See supra, para. 2.25.

> (c) to the probable costs,
>
> and may direct any inquiries on these or other matters before making the appointment.

2.153 Another relevant rule is restricted to execution against land. Rule 383(2), (3) and (4) provides:

> 383(2) Where a judgment debtor has an interest in land which cannot be sold under legal process, but can be rendered available by proceedings for equitable execution by sale for satisfaction of the judgment, the Court may, upon motion served upon such persons as may be directed, order the land or the interest therein or a part thereof sold to realize the amount to be levied under execution.
>
> (3) Upon the return of a motion under this Rule the court may
>
> (a) determine the matter summarily, or
>
> (b) direct the trial of an issue to determine any question or questions.
>
> (4) Pending the hearing of the motion or trial of the issue the Court may grant an interim injunction to prevent the transfer or disposition of the property or interest therein or may appoint an interim receiver of the property or interest therein.

The Rule appears to be little more than a restatement of one aspect of the law of equitable execution as it existed before 1873. It does not fit well with section 122 of the Land Titles Act[234] which contemplates a different process for execution against any interest in land. Rule 383 is yet another example of the confused state of Alberta law regarding execution against land.

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[234] R.S.A. 1980, c. L-5.

2.154 Receivership orders on behalf of unsecured creditors are rare in Alberta. Of the 2316 judgments examined in the Dunlop empirical study,[235] only seven were found in which there was an application for the appointment of a receiver pursuant to Rule 466. Of these, four were granted. No applications or orders under Rule 465 were found.

2.155 Three of the four orders appointed the sheriff receiver of federal government oil money payable to native debtors living on an Indian reservation. The fourth order appointed the sheriff receiver of money to be paid to the debtor from an estate. The three decisions on oil money payable to native debtors may be of doubtful validity after Fox v. Peterson Livestock Ltd.[236]

2.156 The English courts were originally prepared to grant receivership against a wide variety of assets, but more recent cases have restricted the remedy. It is now clear law that (1) the remedy is not available against assets already exigible or garnishable without impediment, and (2) it will not reach assets that cannot be seized or attached at common law as amplified by legislation.[237] The cases do say that a receiving order will go where special circumstances exist, but the courts are reluctant to use this escape hatch. After the restrictive decision of the Court of Appeal in Fox v. Peterson Livestock Ltd.,[238] there is very little room for equitable execution in Alberta law.

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[235] Dunlop Report, para. 9.1.

[236] Supra, note 231.

[237] Dunlop Book, pp. 283-91, 295-303.

[238] Supra, note 231.

(iv) The Charging Order as a Type of Equitable Execution

2.157 The English reform legislation of the nineteenth century[239] did not enable a judgment creditor to reach funds or assets in court or in the hands of a court officer but owing or belonging to the judgment debtor. It is still the law that execution and, less clearly, garnishment will not catch funds or assets in custodia legis.[240] In order to fill the gap, at least as to funds in court, the English judges created a charging order against such assets as a type of equitable execution.[241] The remedy has been granted in Canada,[242] but is very rarely seen today. We found no examples in our research.[243]

(c) The Stop Order

2.158 Rule 494 of the Alberta Rules of Court provides:

> 494(1) Any person claiming to be interested in any money, stock or securities in court, or claiming to have them applied towards the satisfaction of any judgment or execution against the person to whose credit the money, stock or securities stand, may, upon an affidavit verifying his claim, apply ex parte for an order directing that the money, stock or securities shall not be paid out or dealt with except upon notice to him.
>
> (2) The person obtaining the order may be ordered to pay any costs, charges and expenses occasioned thereby to any person interested in the money, stock or securities

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[239] E.g., the Judgments Act, 1838 (1 & 2 Vict.), c. 110; Common Law Procedure Act, 1854 (17 & 18 Vict.), c. 125, ss. 60-67.

[240] Dunlop Book, pp. 306-07.

[241] Watts v. Jefferyes (1851), 42 E.R. 324 (L.C.); Brereton v. Edwards (1888), 21 Q.B.D. 488 (C.A.).

[242] See Dunlop Book, pp. 294-95, but cf. McDougall & Secord v. Inglis (1909), 12 W.L.R. 78 (Alta. S.C.).

[243] Dunlop Report, para. 9.3.

> to which the order relates.
>
> (3) When the judgment, order, decision or certificate is pronounced, made or given in vacation or within six days preceding vacation, a person affected thereby may appeal therefrom during vacation by leave of a judge or may appeal after vacation in the same manner and with the same time as if the judgment, order, decision or certificate had been pronounced, made or given on the first day after the vacation.

The Rule is used, often together with a charging order, to catch funds in court, and funds which have been ordered to be paid into court.[244] We found no examples of the remedy in our empirical study.[245]

g. Imprisonment for Debt

2.159 To this point, our account of creditor-debtor law has concentrated on remedies against the property of the debtor. For much of English history, the primary process was execution against the debtor's person, in other words, imprisonment. However the movement of English and Canadian law has for over 100 years been away from imprisonment towards proprietary remedies, at least for trade creditors.

2.160 The Imperial Debtors Act, 1869,[246] which permitted a form of imprisonment for debt, was held to be part of the law of the Northwest Territories,[247] but this result was reversed by two Alberta statutes[248] which, read together, make it clear that imprisonment for debt, whether based on statute or on the common law, is abolished.[249] This legislative policy has been carried into the Alberta Rules of Court. Rule 703(a) provides that every person is in civil contempt who "fails, without adequate excuse, to obey any order of the court, other than an order for the payment of money."[250] The sanctions for civil contempt include imprisonment.[251]

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[244] Dunlop Book, pp. 308-10.

[245] Dunlop Report, para. 9.3.

[246] (32 & 33 Vict.), c. 62.

[247] _Fraser_ v. _Kirkpatrick_ (1907), 5 W.L.R. 287 (N.W.T.).

[248] An Act respecting the Imperial Debtors' Act of 1869, 1908

2.161 Despite this clear articulation of policy, there remain four situations in Alberta law today where imprisonment can occur in the enforcement of a money judgment:

(1) Imprisonment of maintenance defaulters can and does take place under legislation[252] which will not be considered in this report.

(2) Where a judgment debtor fails to attend on an examination in aid or refuses to make satisfactory answers on the examination, he or she may be held in civil contempt and imprisoned.[253]

(3) It is not clear that the legislation abolishing imprisonment for debt extends to the equitable writ of ne exeat regno which orders a debtor not to leave the jurisdiction on pain

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[248](cont'd) (Alta.), c. 6, s. 1; An Act to Amend the Statute Law (Pt. 1), 1909 (Alta.), c. 4, s. 20.

[249] See Dunlop Supplement, p. 24.

[250] Emphasis added.

[251] R. 704.

[252] E.g., Maintenance Enforcement Act, S.A. 1985, c. M-0.5.

[253] Alberta Rules of Court, rr. 377-78, 703-04.

of imprisonment[254] and which became part of Canadian law under the label of ne exeat provincia.[255]

(4) Rule 703(a) seems to make it clear that failure to obey a court order for the payment of money is not civil contempt. There is however a Nova Scotia case[256] which creates an exception to this sort of legislation where the debtor, in addition to refusing to pay, actively conceals assets with a view to frustrate the judgment creditor. In MacNeil v. MacNeil, the judgment debtor sought to argue that he was being imprisoned for default in payment of a money judgment. The court responded as follows:

> This argument overlooks, however, that the contempt alleged and found by Hart J. to have been committed was not mere default in payment of an order for payment of money, but a defiance of the court by manipulating, concealing and removing assets from the jurisdiction so as to make execution impossible.
>
> The judge's primary emphasis was quite properly on the inequity of removing the securities from the jurisdiction ...
>
> The contempt committed was clearly criminal contempt and not civil contempt ....[257]

The general policy against imprisonment, and all except the first of the exceptions to that policy, will be considered in chapter 6.

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[254] For a recent discussion, see Felton v. Callis, [1968] 3 All E.R. 673.

[255] Dunlop Book, p. 99. The remedy may be available in support of a Mareva injunction in England and Ontario. See Chisholm, "Does 13th-century writ provide new debtor arrest remedy?" (1986), 5 Ont. Lawyers Weekly, No. 42, p. 1.

[256] MacNeil v. MacNeil (1975), 25 R.F.L. 357 (N.S.C.A.).

[257] Ibid., pp. 365, 367.

h. Distribution of Proceeds of Enforcement

(1) Introduction

2.162 To this point, our account of the existing law has concerned itself with the remedies which one unsecured creditor has against a debtor. In practice, the facts are rarely so simple. The most complex issues in creditors' remedies law are questions of priority among unsecured, preferred and secured creditors in their scramble for the debtor's assets.

2.163 In this section, we will concentrate on the distribution of the proceeds of execution, garnishment and other enforcement processes between the unsecured creditors of the debtor. Later, we will say something about secured and preferred creditors.

(2) The Common Law

2.164 Professor Dunlop, quoting Mather on Sheriff and Execution Law, describes the common law position as follows:

> At common law, a judgment creditor was not required to share the fruits of his process with other unsecured creditors. Mather describes the system as follows:
>
> > "Where a sheriff has several writs issued by different creditors against the same debtor, it is his duty to execute that writ first which was first delivered to him, and when he has sold sufficient to satisfy that writ, he should sell under the next in order, and so on, as long as there are goods unsold. If there remain writs unexecuted when all the goods are sold, he should pay the amounts of the several writs in order of priority of time, and

> make a return of nulla bona to the unsatisfied writs."
>
> The reason underlying the rule was that each writ bound the goods of the debtor from the date and time of delivery to the sheriff. These deliveries set the respective priorities of the creditors, unless one of the writs was invalid or had become dormant.[258]

The common law position remains the law today in England, most Commonwealth jurisdictions and the United States.

(3) The Execution Creditors Act

2.165 Most Canadian jurisdictions have changed the common law by requiring a successful creditor to share the proceeds of execution or garnishment with other creditors according to a statutory scheme. The first compulsory sharing legislation of this type was An Act to Abolish Priorities of and Amongst Execution Creditors, passed by the Ontario Legislature in 1880.[259] The Creditors' Relief Act, as it came to be known, was one of several Ontario statutes intended to fill the gap left by the repeal of the federal Insolvent Acts.[260] The Ontario legislation was copied by most other provinces, including Alberta. The federal government later re-entered the field of bankruptcy by passing the Bankruptcy Act of 1919,[261] but the provinces did not respond by repealing the Creditors' Relief Acts which remain in force in most Canadian provinces today.

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[258] Dunlop Book, p. 414.

[259] 1880 (Ont.), c. 10.

[260] 1869 (32 & 33 Vict.), c. 16; 1875 (38 Vict.), c. 16.

[261] 1919 (Can.), c. 36.

2.166 The central section of the Alberta Act[262] is section 2 which provides:

> 2 Except in the cases where it is otherwise specifically provided by this Act, all property seized or attached by virtue of
>
> (a) a writ of execution,
>
> (b) a writ of attachment,
>
> (c) garnishee proceedings, or
>
> (d) proceedings in the nature of equitable execution,
>
> shall be deemed to have been attached on behalf of all creditors entitled by this Act to share in any money received by the sheriff by reason of the seizure or attachment.

Three points should be made about section 2.

(1) It literally applies to all remedies of the unsecured creditor except perhaps the charging order under the Judgments Act of 1838.[263] However the references to seizure and attachment raise some doubt whether the Act was intended to extend to execution against land.[264]

(2) It applies only where property of the debtor is "seized or attached by virtue of" a writ of execution or other enforcement process. It does not catch payments made directly from the debtor to the creditor or to the sheriff unless they are the result of a seizure or attachment.[265]

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[262] Execution Creditors Act, R.S.A. 1980, c. E-14.

[263] (1 & 2 Vict.), c. 110, s. 14.

[264] See annotation to Westhill Leasing Corp. Ltd. v. Rideout (1983), 25 Alta. L.R. (2d) 229, 232.

[265] Dunlop Book, pp. 423-26. But see Execution Creditors Act, R.S.A. 1980, c. E-14, s. 13.

(3) The proceeds of such a seizure or attachment are required to be shared among "all creditors entitled by this Act to share" in them. The Act goes on to identify three types of creditors entitled to share in the proceeds.[266] They are:

(i) creditors preferred by sections 11, 12(a), (b) and (c), 16 and 17,[267]

(ii) creditors who have filed writs of execution with the sheriff and have kept them up to date by filing the appropriate annual statements of payments,[268] and

(iii) creditors who have obtained certificates pursuant to sections 18-26.

2.167 The rest of the Act builds a sometimes confusing structure around the three elements listed above. A substantial body of case law has built up around the Act and its counterparts in other Canadian jurisdictions. There have been calls for the repeal of this type of legislation.[269] Even if retained, there are inadequacies in the drafting of our statute which will be considered below.[270]

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[266] See ss. 10-15.

[267] The list of preferred and secured creditors in these sections is not complete.

[268] Pursuant to ss. 28-29.

[269] Law Reform Commission of British Columbia, Report on Creditors' Relief Legislation: A New Approach (1979), hereafter L.R.C.B.C., Creditors' Relief Legislation.

[270] See e.g., the comments of Clement J.A. in Wilkinson Co. Ltd. v. Nemethy (1978), 7 Alta. L.R. (2d) 30 (C.A.).

i. Secured and Preferred Creditors

2.168 In the last section, we looked at the distribution of the proceeds of execution and other enforcement processes among unsecured creditors. It would however be misleading to leave the subject without considering briefly secured and preferred creditors as well. For the purposes of this discussion, we adopt the following definitions of these terms:

> By "secured creditor", I mean a creditor who has contracted with his debtor to obtain an interest in some or all of the latter's property or some other additional right in order to secure a payment of the principal debt. My intention is to exclude from the concept any non-consensual security interest such as the common law lien of a repairer of chattels or the statutory lien under, for example, mechanics' lien legislation.
>
> A "preferred creditor" is a creditor who has been given some advantage over other claimants by the common law or by legislation. The advantage may take the form of a lien or other security interest in the debtor's property or it may be expressed as a right to be paid in preference to others out of the proceeds of execution, garnishment or other remedies despite the sharing policy of the creditors' relief legislation. Exemption statutes sometimes provide expressly that they do not apply against certain plaintiffs, such as spouses suing for maintenance. The common characteristic of these various preferential devices is that they have been created by law rather than by the agreement of the parties.[271]

2.169 When a debtor gets into financial trouble, he is likely to default on all of his or her debts, whether secured, preferred or unsecured. When the financial collapse occurs, it is the secured and preferred creditors who take the lion's share of whatever property is left. Secured creditors seek to realize on their security, while preferred creditors assert their common law or statutory preferences to put themselves ahead of the mass of unsecured creditors. The result is that the creditors without sufficient economic or political clout to obtain contractual security or legislated preferences are left with pari passu shares in whatever property may be left.

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[271] Dunlop Book, pp. 433-34.

2.170 We have concluded that the remedies of the secured creditor pursuant to the security are beyond the scope of this study. There can be little doubt that the position of unsecured creditors is substantially worsened by the special status of their secured rivals. However a study of the multitude of possible security agreements would take us far beyond the present study into fields which are under consideration elsewhere.[272] We will say no more about the secured creditor generally, although we will want to consider that status under the Exemptions Act and the Execution Creditors Act.

2.171 Our approach to the preferred creditor is similar. The situation has been summarized as follows:

> At common law, unsecured creditors ranked in order of the delivery of their writs of execution to the sheriff. At the same time, the courts offered to certain creditors the privilege of being paid first, whatever the time of delivery of their writs. The Crown was the best example, but some private creditors, for example, landlords and some lien claimants, were favoured with preferred rights or more effective collection processes.
>
> Canadian legislatures have modified the common law in response to two contradictory principles. The creditors' relief legislation has replaced the first in time, first

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[272] For example, mortgages or personal property security legislation.

> in right rule with the requirement that a judgment creditor must share the proceeds of his execution pari passu with other unsecured creditors entitled to share. The thrust of the legislation is egalitarian, permitting all creditors to rank as equals in the division of the debtor's assets.
>
> On the other hand, much modern Canadian legislation is motivated by the directly opposed policy of singling out specific creditors to be preferred over their fellows. These preferences may be expressed as exceptions from exemptions legislation or as rights to be paid in priority to the general mass of creditors entitled to share under Creditors' Relief Acts. Unfortunately for the researcher, preferences are not restricted to this type of legislation but can be found scattered through a multitude of statutes devoted to specific government departments or interest groups. The Crown, in its federal and provincial aspects, has been diligent in improving on its prerogative rights and protecting its own claims and those of a myriad of state departments and agencies. Groups of private creditors have also sought and obtained the assistance of Parliament or the legislatures to promote themselves out of the unhappy status of the unsecured claimant.
>
> The result of this legislative activity is a bizarre juxtaposition of a sharing regime imposed on unsecured creditors while others with sufficient economic or political muscle to obtain security or preference fight among themselves for supremacy. The statute law exhibits a luxurious proliferation of conflicting statutory preferences, each drafted carefully in an effort to be "more prior" than the rest. In effect, the free-for-all scramble at common law for the debtor's assets has by statute been translated to the level of secured and preferred claimants, leaving the unsecured creditors with the barren right to share equally in whatever is left.[273]

2.172 There is a strong argument that the structure of preferred creditors should be examined as a whole with a view to eliminating or altering some preferences, and organizing the rest into a coherent system.[274] We will not undertake that enormous task here. Again our reason is to keep the present study within reasonable limits.

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[273] Dunlop Book, pp. 442-43.

j. Success of the Creditors' Remedies System

(1) Introduction

2.173 One of the purposes of the Dunlop empirical study was to estimate the overall success of the system in collecting judgment debts. Such an estimate is bound to be incomplete where the study is limited to court, sheriff and land titles files. These sources give only a partial picture of the money actually paid, because they do not record payments made directly from debtor to creditor. In such a case, the creditor might have filed a satisfaction piece, or might have done nothing but let the writ lapse. Despite these limitations, the researchers did make an estimate of the system's success in collecting money, insofar as the facts could be gathered from a study of court files alone without interviews with creditors and debtors.[275]

(2) Creditors' Declarations of Satisfaction

2.174 In many files, there appeared satisfaction pieces or letters to the sheriff indicating that the debt had been "satisfied" or "discharged." (The words were used indiscriminately.) The researchers added together all the cases in which the creditor indicated in writing that the debt had been satisfied or discharged in full. In some files, this indication took the form of a satisfaction piece or a notice of discontinuance of action filed in the clerk's office. In others, there was a letter to the same effect in the sheriff's office. Still other creditors communicated with both offices.

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[274] Cf. Monnin J.A. in Man. Securities Comm. v. C.I.B.C. (1979), 30 C.B.R. (N.S.) 80 at 83 (Man. C.A.)--"At the provincial level it is time for the legislature to establish true and proper priorities in cases of receivership or other insolvencies not falling under the Bankruptcy Act."

[275] Dunlop Report, c. 10.

2.175 Creditors' declarations of satisfaction cannot be taken completely at face value. In most cases, the creditor would not bother to file such a document unless some payment had been received, but he or she might have been happy to accept part payment directly, thus circumventing the operation of the Execution Creditors Act. A few satisfaction pieces may have been filed where no payment was received if the debtor was able to apply some pressure to the creditor, such as a well-founded threat to open up the judgment and file a counterclaim.

2.176 The researchers' principal conclusion was that 442 of the judgments in the sample were followed by creditors' declarations of satisfaction of the debt. Judgments accompanied by declarations of satisfaction amounted to 22.5% of the number of judgments enforced by some means and 19.1% of the total number of enforced and unenforced judgments in our sample. In other words, about one-fifth of the creditors in the sample wrote the clerk or the sheriff to say that their claims had been completely satisfied.

2.177 We noted earlier that a satisfaction piece may be filed by a creditor who has not been paid 100% of his debt. It would be wrong to assume that 20% of the sample were paid in full by their debtors. On the other hand, the 20% figure substantially under-estimates the number of creditors paid their debts because it excludes two groups of successful creditors, namely, (1) creditors paid directly who did not file satisfaction pieces, and (2) creditors who collected money by seizure or garnishment and who did not file a satisfaction piece.

(3) Status of Writs in the Land Titles Offices

2.178 We next wanted to look at the status of writs filed in the land titles offices in order to discover which writs had been discharged and which had not. What was found was that 230 writs (19.2% of the writs filed in the two land titles offices) were later classified as discharged by those offices. This total would not include writs discharged as to a specific parcel of land. Such specific discharges may be attached to the writ or noted on the certificate of title of the affected land. The writ would however remain in the live writ register.

2.179 It is interesting to note that the percentage of discharged writs in the land titles office is very close to the percentage of declarations of satisfaction in the clerks' and sheriffs' offices, discussed in the previous section. The similarity of the percentages masks a problem in the system. The sheriff will, if asked to do so, inform the land titles office that a writ has been satisfied, but he or she will not automatically pass on such information. Before 1982, one of the two Alberta land titles offices was sufficiently concerned to send its own staff to the closest sheriff's office to search for indications of satisfaction or discharge. That practice has now stopped, but its existence suggested that the land titles office which adopted the practice felt that it was not getting information as to all satisfaction pieces. The office did not apparently search other sheriffs' offices before 1982. The second Alberta land titles office has not within our study period searched any sheriffs' offices for this purpose.

2.180 The researchers wanted to ascertain whether the total number of writs shown as discharged in the sheriffs' offices was significantly different from the totals of discharged writs in the land titles offices. They therefore searched all writs filed in both the sheriffs' and the land titles offices. They pulled those writs which were recorded as discharged in the former offices to see if the discharge was also recorded in the land titles system. Files were excluded where writs were filed in the land titles office but without being filed with the sheriff.

2.181 It was found that only 214 of the writs filed both in the sheriffs' offices and land titles offices were noted as discharged in the latter offices, while in the sheriffs' offices, 294 of the writs filed were noted as discharged. Thus only 73% of the files with writs recorded as discharged in the sheriffs' offices were also recorded as discharged in the land titles system. Another way of stating these results is that 27% of the writs filed against debtors' land in the land titles offices had actually been discharged according to the records in the sheriffs' offices. This percentage is a significant indication that a serious information breakdown exists in the judgment enforcement scheme, specifically at the point at which the sheriff notes writs in his or her hands as discharged. The breakdown is less significant in the large district sheriff's office, where 121 writs, or 92.4% of those writs noted as discharged in the sheriff's office, are so noted in the land titles offices. By contrast, the information breakdown is greater in the medium and small districts where only 51 writs and 42 writs, or 53.7% and 61.8% respectively, of the writs noted as discharged in the sheriff's office are so noted in the land titles office.

2.182 On the other hand, it should be remembered that many declarations of discharge in the sheriffs' offices represent only partial satisfaction of the judgment creditor's claim. From his or her point of view, it is desirable that the writ in the land titles office remains alive to pick up the rest of the debt. The debtor may be unhappy about this result, particularly if the agreement with the creditor amounts to an agreement of part performance which has the legal effect of discharging the rest of the debt.[276]

(4) Estimated Success of the System as a Whole

2.183 The Dunlop study then attempted to form an opinion of the success of the creditors' remedies system as a whole in collecting money for creditors. At the outset, it is necessary to remind the reader that this estimate is based on a study limited to court, sheriff and land titles files. The researchers conducted no interviews of creditors or debtors and made no other attempt to discover what money was paid.

2.184 Such a file study underestimates, perhaps substantially, the amount of money recovered because it does not discover money paid by a debtor to a creditor where no record of that payment appears in the files. In another respect, a file study overestimates the success of the process if it takes literally the creditor declarations of satisfaction which are found in the clerks' and sheriffs' offices.

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[276] See Judicature Act, R.S.A. 1980, c. J-1, s. 13(1).

2.185 Despite these reservations, the file study does contain some information relevant to the success of the creditors' remedies system in collecting money. We have earlier in this chapter noted the number of satisfaction pieces in the various offices. The study recorded money actually paid into and out of court pursuant to a garnishee summons, money realized as a result of execution, and payments to the creditor noted in his or her renewal of execution statements filed in the sheriffs' offices pursuant to the Execution Creditors Act. The researchers also noted money distributed to creditors with writs in the sheriff's office as a result of a successful execution or garnishment by another creditor.

2.186 Based on this data and ignoring for the moment all judgments with satisfaction pieces, it was found that the overwhelming majority of judgment creditors in the sample recovered little or nothing on their judgments. 1585 judgments (86%) fell into the "no recovery" category; only 74 judgments (4%) fell into the "over 90%" recovery class. More money was recovered in the medium judicial district than in the other districts.

2.187 The conclusions set out in paragraph 2.186 are misleading because they omit all judgments which were followed by declarations of satisfaction by the creditor, either in general terms or limited to land. The total sample included 442 judgments followed by satisfaction pieces filed in the clerks' or sheriffs' offices. The researchers also turned up thirty-two judgments which were followed by satisfaction pieces limited to a specific parcel of land or to land generally. The problem was how to compare judgments with and without satisfaction pieces in order to give a more complete picture of the system.

2.188 It is not helpful to assume that satisfaction pieces mean that the creditors were paid their claims in full because, as noted above, this assumption is false in most cases. These documents usually are evidence of a part payment, but how much is impossible to say from the court files. It would be just as misleading to assume that all satisfaction pieces represent 50% recovery.

2.189 However, one can say that almost all satisfaction pieces represent some recovery, without trying to guess at actual percentages. It is therefore more helpful and accurate to divide the total sample into two categories: judgments with no recovery and judgments with some recovery, and to include all judgments followed by satisfaction pieces in the latter group.

2.190 Following this plan, the researchers found that 731 judgment creditors (31.6% of the sample) recovered something after filing their judgments. Because the study was limited to court files, it did not record direct payments from debtor to creditor where no satisfaction piece was filed. If it had, the percentage of judgments on which money was paid would no doubt be higher. If the researchers had followed alias writs into judicial districts other than the ones where the judgments were obtained, the percentage would be higher still.

2.191 Even after the recovery percentages are corrected upwards, it may still be true that a majority of judgment creditors recovered little or nothing on their claims. In many cases, creditors chose to carry their claims to judgment and often to enforcement and then to discontinue their efforts. Perhaps they had learned more about their debtors as they pursued their lawsuits. If the knowledge was discouraging (e.g., the debtor had no assets), the creditors may have terminated their collection efforts rather than wasting more of their own money on a profitless exercise. Our study did not work out the average length of time which creditors took to collect part or all of their claims.

2.192 Because our study concentrated on court files, it did not record the many cases in which creditors chose to write off their debts rather than litigate at all. A creditor may abandon a claim because it is too small to bother about or because the creditor knows that the debtor has nothing. Another reason for writing off a debt is that the creditor believes that the legal system will fail to collect the money. We have no way of knowing how creditor perceptions affected their decision to sue or not.

2.193 Even where creditors sued and carried their remedies as far as possible, many still got nothing. This may be less a fault of the system than a reflection of the fact that many debtors have little or no assets and income above their exemptions. Even if the present exemptions were to be reduced or abolished, it is unlikely that creditors' remedies would recover much more from debtors who have nothing.[277]

k. A System of Threats and Leverage

2.194 It is often said that our present creditors' remedies operate primarily as a system of threats and pressures designed to goad the debtor into paying the claim or at least discussing the matter with the creditor. "The collection process is characterized by both a series of escalating threats and an appeal to the debtor to respect certain public values."[278] In the case of wage garnishment, the threat is not only the loss of income but impliedly the danger to the debtor's job resulting from the unwilling involvement of the employer. As for execution, the threat is that the debtor's precious possessions will be sold, often for a fraction of their true value.

2.195 It may be that the present remedial system operates better as a threat than when the remedies have to be invoked and carried through to completion. Execution against land is the best example of a remedy which may have an impact on the debtor far out of proportion to its practical utility.[279] As a result, it is sometimes suggested that the creditors' remedies system is more likely to succeed in collecting money from poor, unsophisticated and naive defendants, but will be less effective against more experienced and hard-bitten debtors.

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[277] More will be said about the success of the system in c. 5.

[278] Ramsay Report, p. 189. See also Parker, pp. 94-96.

[279] See Westhill Leasing Corp. Ltd. v. Rideout (1983), 25 Alta. L.R. (2d) 229.

2.196 In our empirical study, we noted that the creditors' remedies system may be likened to a funnel or to a series of filters.[280] A large number of statements of claims are filed, fewer judgments are obtained, still fewer writs of execution are issued and so on down to the comparatively small number of creditors who press on to garnishment or to seizure and sale. Our empirical study did not explore what happened to the claims that disappeared at various stages of the collection process. One can assume that some of these claims were abandoned by the creditors, while in other cases the debtors paid part or all of the debt. As to the cases of partial or total payment, the system operated to collect money, in part because of the threat to the debtor of the results which might follow if no payment was made.

2.197 Our empirical study thus supports the view that the creditors' remedies system operates as a threat designed to coerce payment or at least settlement. Further evidence may be the substantial number of satisfaction pieces which we found in our file study.[281] It is unlikely that any creditor would volunteer such a document unless he or she had received a payment. Indeed, if we ignore the cases where satisfaction pieces are filed, the creditors' remedies system during the years under study was not conspicuously successful in collecting money. It may therefore be true to say that Alberta creditors' remedies law works better as a threat than when it is actually used as a collection device.

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[280] Dunlop Report, para. 3.6. See also Parker, pp. 79-82, 97-101.

[281] Dunlop Report, c. 10.

2.198 To some extent, this aspect of the remedial process may be not only unavoidable[282] but also healthy and beneficial. William Whitford, in an essay in the Wisconsin Law Review,[283] starts from the "single most important fact about the consumer credit collection system" that the vast majority of delinquent debts which are ultimately paid "are collected through 'commercial' debtor payments made after some kind of bargaining between creditor and debtor."[284] The function of judicial collection remedies, as well as non-judicial harassment, is to provide creditors with ways to persuade reluctant debtors "that substantial harms can be avoided by payment of the debt."[285]

2.199 Whitford argues that the primary effect of collection remedies is as follows:

> They enable the creditor credibly to convince the debtor that initiation of coercive execution will necessarily or very likely ensue upon lack of voluntary payment, and whether or not such execution would benefit the creditor directly, it would probably cause the debtor serious harm.[286]

The debtor whose wages are garnisheed may be dismissed, or employment opportunities may be damaged. "Property execution . . . not only deprives a debtor of the property seized, but the value of the lost property to him or her is nearly always far in excess of the amount of debt retired by the execution."[287]

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[282] Some jurists liken the law to a kind of bluff which works so long as the bluff is not called. See e.g., Olivecrona, Law as Fact (1939).

[283] "A Critique of the Consumer Credit Collection System," [1979] Wis. L.R. 1047, hereafter Whitford.

[284] Whitford, p. 1051.

[285] Whitford, pp. 1057-58.

[286] Whitford, p. 1058.

2.200 The debtor also has countervailing leverages in the debt collection process. He or she may refuse to do further business with the creditor or refuse to pay the debt, requiring the creditor to sue. The debtor may gain substantial benefit from protective laws such as exemptions statutes or rules limiting prejudgment remedies. Finally the debtor may seek stays of execution or assign into bankruptcy. The use of these protective devices will be limited by lack of money and credibility, and by the lack of knowledge resulting from not having a continuing role in the debt collection game.[288]

2.201 Whitford's view of the creditor-debtor process seems a reasonable one, although one may want to moderate some of the threats contained in the present system. We will later consider ways of protecting the debtor's job and also the problem (if it exists in Alberta) of low prices at sheriffs' sales.[289] In general, however, we share Whitford's view that the debt collection process works now and should continue to work in the future as a device to persuade the antagonists to compromise their differences without pressing their legal rights to their conclusion. It is not a goal of the system that all debts should be collected by execution and garnishment. Instead the process should push the parties to work out their problem themselves, rather than pursuing their litigation to the bitter end. This is not to deny that the law should, if pressed into service, be as effective as possible in collecting such assets and debts as are exigible. Otherwise the threat implied by the system will be an empty one.

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[287] Whitford, p. 1060.

[288] Whitford, pp. 1060-66. We will later in this report address the problem of the debtor's inability or unwillingness to assert his legitimate claims or defences in the course of the creditors' remedies process.

[289] Whitford proposes that the system be reformed to downplay coercive collection in the hope of encouraging more informal bargaining and settlement, although coercive collection will always be needed as a persuasive device. Whitford feels that a serious restriction of judicial creditors' remedies would likely encourage abusive and harassing debt collection tactics, such as those discussed in our Report No. 42: Debt Collection Practices (1984).

2.202 A similar approach to the judicial collection process was expressed in a research report prepared for the Scottish Law Commission. Doig and Millar studied creditors' attitudes to the remedial system in that country, and concluded in part as follows:

> Debt recovery procedures including diligence secure payment of the vast majority of debts, and overall a very small proportion of debts is written-off; but it is not possible to obtain detailed quantitative measures of effectiveness because the proportion of outstanding debts pursued at any stage which are paid cannot be separately distinguished. Creditors and debt collection agencies themselves think that the small number of cases which reach sale executed stage is the most important quantitative measure of the success of diligence since the majority of debts are paid in response to each stage in the debt recovery process. The specific amount of money recovered by arresting a debtor's wages or selling his goods is an inaccurate and misleading measure because it discounts the role of the final stages in encouraging settlements at earlier stages.[290]

A similar conclusion might be drawn as to the Alberta system.

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[290] Scot. R.R. #8, p. 4.

1. Breakdown of Communication

2.203 Whitford's analysis of the debt collection process led him to the view that debts are likely to be repaid because the debtor and creditor have agreed to a repayment schedule of part or all of the debt. Coercive collection by legal remedies is unlikely alone to accomplish very much. It follows that creditors' remedies law should do everything possible to encourage communication between the parties to the litigation. It is however a common criticism of the debt collection process that, instead of encouraging communication, it forces the parties away from each other and encourages a breakdown of communication between debtor and creditor.

2.204 Ramsay argued that this breakdown resulted from the basic structure of the present debt collection process.[281] Most major creditors collect debts in a highly bureaucratic fashion. There is a structure of rules, an ethic of impersonality, and a hierarchy of authority and specialization of collection functions within the creditor organization. The creditor tends to classify the debtor as dishonest or feckless on the basis of the limited information available to him, and future communication is based on this classification. As a result, such discussions as occur between creditor and debtor are typified by "assertion, denial, threat and counterthreat" but not by "conversation and negotiation."[282] From the creditor's point of view, the bottom line is that the debtor owes the money and ought to pay.

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[281] Ramsay Report, pp. 208-22. See also Parker, pp. 152-55.

[282] Leff, "Injury, Ignorance and Spite - The Dynamics of Coercive Collection" (1970), 80 Yale L.J. 1, 41, hereafter Leff.

2.205 The debtor who is having problems may be embarrassed or afraid to discuss them, especially with creditors who are usually more sophisticated and knowledgable.

> A debtor may for a number of reasons decide to remain silent during collection. This may be because of fatalism, the conviction that there is nothing one can do about the problem and therefore one might as well take the consequences. The debtor may simply be afraid.[283]

However these actions by the debtor will "result in his being labelled 'unwilling to cooperate' and justify the 'cold shower' of garnishment."[284]

2.206 Ramsay concluded that it was not in the creditor's interest to educate the debtor as to the specific consequences of default "because of the important psychological effect of setting out vague undesirable consequences . . . which will hopefully maintain a state of 'controlled anxiety' in the debtor inducing him to pay."[285] The result is that the debt collection process which ought to encourage communication instead "may be creating 'deviants' or 'recalcitrant' debtors.[286] This ascription of deviancy is legitimized by the use of the legal system against such debtors.

2.207 As a result of this argument, Ramsay, following other critics of the debt collection process, has proposed an extensive compulsory mediation system for debt actions in the

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[283] Ramsay Report, p. 212.

[284] Ramsay Report, p. 213.

[285] Ramsay Report, p. 214.

[286] Loc. cit.

Provincial Court of Alberta.[297] The merits of this proposal, and the bleak view of the present law on which it is based, will be discussed in chapter 5.

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[297] Ramsay Report, p. 222; Ramsay Proposals, passim. See also Leff, pp. 36-46.

CHAPTER 3. THE NEED FOR REFORM

a. History of Creditors' Remedies Reform

3.1 Having described the present creditors' remedies system, it is now necessary to identify the problems and weaknesses which have led us to make reform proposals. Before doing so, something should be said about the history of law reform in creditor-debtor law.

3.2 Until recently, the law of unsecured creditors' remedies has resembled a neglected backwater. The last great period of reform in England and Canada was completed well before the end of the nineteenth century,[1] and no major changes have taken place since that time, at least in this country. During the first half of the twentieth century, the field of creditor-debtor law was neglected by legislatures and law reformers. Part of the reason was that there was no obvious political advantage to be gained by the passage of a statute concerning debtor-creditor relationships. The case law has been largely developed by lower courts, often after inadequate argument. Academic interest has until recently been non-existent in this country. Law schools did not teach creditors' rights courses until after World War II, and writing on the subject was rare.[2]

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[1] In England, see Judgments Act, 1838 (1 and 2 Vict.), c. 110; Common Law Procedure Act, 1854 (17 and 18 Vict.), c. 125; Debtors Act, 1869 (32 and 33 Vict.), c. 62. The great Canadian innovation was the Ontario Act to Abolish Priorities of and amongst Execution Creditors, 1880 (43 Vict.), c. 1. See now Execution Creditors Act, R.S.A. 1980, c. E-14.

3.3 In the past thirty years, however, there has been a renewed interest in creditors' remedies. Courses are now common in Canadian law schools, and some writing is taking place. The growth of consumer credit since World War II has increased interest in legal processes for collecting debts. The brief and inconclusive war against poverty in the 1960s caused people to speculate about the fairness of remedial processes accepted without question for generations.[3]

3.4 Law reform commissions in England and throughout the Commonwealth have also become interested in creditors' rights. Reports have been published in England,[4] Scotland,[5] Northern Ireland,[6] Australia,[7] Ontario,[8] New Brunswick,[9] British

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[2] An exception is the flurry of law books on all subjects, including creditors' remedies, published before and during the First World War. See e.g., Scott, Chattel Exemptions from Writs of Execution (1917); Parker, Frauds on Creditors and Assignments for the Benefit of Creditors (1903).

[3] See Poverty in Canada: Report of the Special Senate Committee on Poverty (1971), pp. 105-10.

[4] The Payne Committee.

[5] Scot. Memos 47-51.

[6] Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees in Northern Ireland (1965), hereafter the Anderson Committee.

[7] Kelly, Debt Recovery in Australia (1977), hereafter Kelly; Law Reform Commission, Report No. 6: Insolvency: The Regular Payment of Debts (1977), hereafter Aust. L.R.C., Report No. 6; Law Reform Commission, Discussion Paper No. 6: Debt Recovery and Insolvency (1978), hereafter Aust.L.R.C., Discussion Paper No. 6.

[8] Ontario Law Reform Commission, Report on the Enforcement of Judgment Debts and Related Matters (vols. 1-3, 1981; vols. 4-5, 1983), hereafter Ont. L.R.C. Report, vols. 1-5.

[9] Dore and Kerr, Third Report of the Consumer Protection Project: Volume II: Legal Remedies of the Unsecured Creditor

Columbia[10] and Manitoba,[11] and studies are underway elsewhere. There have been some innovative statutory changes, such as the enforcement office established in Northern Ireland in 1969,[12] and the system of enforcement orders in the new Nova Scotia[13] and Prince Edward Island[14] Rules of Court.

3.5 Apart from the present project, the law reform movement in creditors' remedies has hardly touched Alberta. Such legal changes as have occurred since the creation of the province have been largely patchwork in nature, dealing with specific problems without taking into account the overall design of the system. As a result, creditors' remedies law in this jurisdiction is in need of reform at a technical level and also on more basic issues of policy and process. In the rest of this chapter, it is intended to make out the case that the law of creditors' remedies in this jurisdiction needs a thorough technical overhaul. In chapters 4 and 5, we will address more fundamental questions of policy.

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[9] (cont'd) After Judgment (1976), hereafter Dore and Kerr.

[10] The British Columbia Law Reform Commission has published several working papers and reports over the past fifteen years on various aspects of creditors' remedies.

[11] Manitoba Law Reform Commission: Report on the Enforcement of Judgments: Part I: Exemptions Under "The Garnishment Act" (1979); Part II: Exemptions Under "The Judgments Act" (1980); Part III: Exemptions and Procedure Under "The Executions Act" (1979), hereafter Man. L.R.C. Report on Exemptions, Parts I-III.

[12] Judgments (Enforcement) Act (N.I.) 1969, c. 30.

[13] Civil Procedure Rules and Related Rules (1971), orders 52-54.

[14] Rules of Court (1977), orders 52-54.

b. Generally

3.6 The present Alberta law of creditors' remedies is a hodge-podge of English common law and equitable rules, English and Canadian statutes, together with judicial decisions which try to make sense of it all. The result is a confused collection of rules which can, in part, be understood only in the light of their history. A further complicating factor is that the area of enforcement of judgments is not a discrete part of the legal system; it involves constitutional and administrative problems as well as commercial, contract and property law. Another difficulty is that a considerable gap exists between the rules in the books and the rules as they actually work in the offices of sheriffs, clerks of the courts, land titles registrars and even chambers court judges.

3.7 The messy, incoherent nature of Alberta creditors' remedies law can be illustrated in a variety of ways. The specific situations we have chosen to discuss below are not the only or even the best examples; others could have been chosen. Our purpose in the rest of this chapter is not to question the fundamental approach of Alberta creditors' remedies; that task is reserved to the next two chapters. Our objective here is simply to show that, assuming the policy goals of Alberta creditors' remedies law to be acceptable, the technical implementation of those goals is in our view seriously flawed.

c. System Antiquated and Out of Date

3.8 A general criticism of the present law of creditors' remedies is that it is antiquated, out of date and inappropriate to current patterns of marketing and credit. It is generally agreed that the use of consumer credit has increased substantially since the Second World War.[15] A creditors' remedies system developed in the nineteenth century and virtually untouched since then is bound to be somewhat irrelevant to modern needs.[16]

3.9 One of the two important remedies of the creditor, the writ of execution, was developed in the Middle Ages as a remedy against choses in possession and, despite sporadic efforts at reform, remains ineffective against many choses in action.[17] Creditors in Alberta today can, in theory, make use of creaky Victorian relics like the charging order[18] and sequestration.[19] The Exemptions Act,[20] despite recent amendments, remains a statute more appropriate to a pioneer rural economy than to modern Alberta. In all of these cases, the problem is simply that the law has not kept up with changing social and economic conditions.

d. Exigibility and Attachability

3.10 One assumes that the purpose of a creditors' remedies system is to make available to execution or attachment all of the property of the judgment debtor unless there is a good reason why some assets should not be exigible. The most common reason is that certain property and income should be declared exempt from execution or attachment because they are necessary for the survival of the debtor and the debtor's family, or for work. There may be other countervailing policies.

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[15] For statistics, see infra, para. 4.3.

[16] Cf. Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation (Canada, 1970), pp. 51-62, hereafter the Tassé Committee.

[17] Supra, paras. 2.86-2.89.

[18] Supra, paras. 2.142-2.145.

[19] Supra, paras. 2.148-2.149.

[20] R.S.A. 1980, c. E-15.

3.11 Under present Alberta law, there are assets and debts which are not available to the creditor because of flaws in the law rather than because of a conscious policy decision.[21] Shares in non-reporting companies may be exigible but are difficult to sell.[22] There are many choses in action, such as joint bank accounts[23] and some kinds of term deposits,[24] which cannot be attached or, one assumes, seized. There are more complex assets which may fall between or may be divided among the two remedies of execution and attachment. Examples are the vendor's interest under a conditional sales agreement[25] and the R.R.S.P.[26]

3.12 It may be that some of the assets discussed in the previous paragraph should be completely exempt, or that provision should be made to protect third party rights. These are issues which the Institute will consider later. What we are saying here is that the non-exigibility of these assets at present results from the clumsiness of the available remedies rather than from overt policy decisions.

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[21] See generally Dunlop Book, pp. 158-61.

[22] But cf. *Associates Finance Co. Ltd.* v. *Webber*, [1972] 4 W.W.R. 131 (B.C.S.C.). See Dunlop Book, pp. 166-69.

[23] *Banff Park Savings and Credit Union Ltd.* v. *Rose* (1982), 22 Alta. L.R. (2d) 81 (C.A.).

[24] *Prov. Treasurer of Alberta* v. *Hutterian Brethren Church of Smoky Lake* (1980), 12 Alta. L.R. (2d) 368 (C.A.).

[25] Dunlop Book, pp. 155-56, 161; cf. *Re Smith*, [1924] 3 D.L.R. 16 (Alta. T.D.), approved in *Palmer* v. *Southwood*, [1976] 3 W.W.R. 556 at 559-60 (Alta. C.A.).

[26] Dunlop Book, p. 243; Dunlop Supplement, pp. 88-89.

e. Information About the Debtor

3.13 In order to seize property of the debtor, it is necessary for the creditor or the sheriff to know the debtor's whereabouts and what assets he or she has. The common law put the responsibility on the sheriff to use reasonable diligence to search out the property of the execution debtor in his bailiwick.[27] Such an onerous duty may have been appropriate before the Industrial Revolution, but it is clearly not workable in urban Alberta today where the sheriff does not and cannot know the judicial district in sufficient detail to discharge these common law duties.[28]

3.14 Whatever the law says, the burden to find out about the assets of the debtor has effectively shifted to the judgment creditor. He or she has the right to examine the debtor and others in aid of execution in order to discover what assets exist.[29] Moreover the sheriff today is reluctant to levy until told by the execution creditor what property the debtor has and where it is located.[30] A major complaint of sheriffs' officers to us was that creditors and their solicitors failed to give the sheriff's office adequate information about the debtor, leaving the officers to dig out such information on their own.[31]

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[27] Dunlop Book, p. 384.

[28] Nor can he find out by using the examination in aid of execution. See Alberta Rules of Court, rules 372-82. This result is clear for rules 372 and 373, although quaere rules 374 and 375.

[29] Supra, note 28.

[30] See Dunlop Book, pp. 385-86.

3.15 One would therefore assume that examinations in aid of execution would be common occurrences in practice. In fact, our empirical study[32] showed that appointments to examine were issued in support of only 137 (or 7.4%) of the judgments where writs of execution had been issued. The court files we searched did not reveal whether these examinations were in fact held, much less whether they were helpful to the examining creditor.

3.16 At least three reasons occur to us to explain the relative lack of use of the examination in aid. The process is expensive, involving conduct money[33] and often a lawyer to carry out the examination. It is unlikely that the examination will tell the creditor any good news; it is more common to discover that the debtor has nothing to seize or attach. Finally we suspect that the penalties on the debtor for non-attendance or for untruthful answers are weak. Our researchers found only 13 applications (10 of which were successful) for an order to the debtor to appear or be committed for contempt. We found only one case where the debtor actually was committed, and he was later discharged.[34]

3.17 Accurate information about the debtor's assets is essential for creditors' remedies to operate. The debtor is unlikely to volunteer such information, and the creditor or the bailiff will have trouble discovering it. Many of the reform reports written in the past twenty years have proposed solutions to the problem which will be considered below.

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[31] Dunlop Report, paras. 6.20-6.21.

[32] Dunlop Report, paras. 5.7-5.12.

[33] Alberta Rules of Court, rules 204, 382.

[34] Dunlop Report, para. 5.12.

f. Inconsistent Statutes

3.18 We observed in chapter 2 that the law of creditors' remedies is scattered through several statutes, especially the Seizures Act,[35] Exemptions Act,[36] Executions Creditors Act[37] and the Land Titles Act,[38] as well as the Rules of Court. Some important elements of the Alberta law are found in old English[39] and Alberta[40] Acts and in the common law. No attempt at codification has been made.

3.19 This jumble of statutes, rules and case law would not be particularly upsetting if the drafters of the Acts had made some attempt to integrate them with each other. However the legislation bears the marks of cut and paste drafting with the predictable result that there is no common plan or coherent structure. The best illustration is the process of execution against land which is a quagmire for the unsuspecting lawyer.[41]

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[35] R.S.A. 1980, c. S-11.

[36] R.S.A. 1980, c. E-15.

[37] R.S.A. 1980, c. E-14.

[38] R.S.A. 1980, c. L-5.

[39] Judgments Act, 1838 (1 and 2 Vict.), c. 110.

[40] An Act respecting the Imperial Debtors' Act of 1869, 1908 (Alta.), c. 6; An Act to Amend the Statute Law (Pt. 1), 1909 (Alta.), c. 4.

[41] See Westhill Leasing Corporation Ltd. v. Rideout (1983), 25 Alta. L.R. (2d) 229. See also supra, c. 2, para. 2.116.

g. The Seizures Act

3.20 The Seizures Act[42] should be singled out for comment. It is a grab bag of sections, some of which apply to distress under personal property security and others to seizure and sale under a writ of execution. There are provisions on exigibility of personalty and of some interests in realty, the process of seizure, including removal and sale, and the sheriff's duties and liabilities. The Act is by no means a code; sections relevant to all of the above topics are found in a variety of other statutes and in the Rules of Court. The drafting of the Seizures Act varies from good to obscure. The statute in its present form is unnecessarily confusing and disorderly.

h. Mechanical Slips

3.21 Creditors' remedies legislation has been in existence in Alberta since the province's formation, and one would hope that simple slips would long since have been eliminated from the statutes and rules. This is unfortunately not the case. Two examples may suffice.

(1) The Alberta Rules of Court talk at various points about "writs of fieri facias"[43] and "writs of execution."[44] One assumes that the terms refer to the same process,[45] but the use of the two phrases suggests that a distinction was intended.

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[42] Supra, note 35.

[43] E.g., r. 346.

[44] E.g., r. 344.

[45] Cf. Sims, "The Writ of Execution and the Garnishee Summons," in Legal Education Society of Alberta, Dealings Between Creditor and Debtor (1982), p. 1G, hereafter Sims.

(2) Section 1(1)(f)(i) of the Exemptions Act[46] exempts from seizure "one automobile [used for certain purposes and] valued at a sum not exceeding $8,000." Section 1(1)(e) of the same statute exempts one "mobile home . . . if the value of the mobile home does not exceed $20,000" but, if its value does exceed $20,000, the mobile home may be sold, the debtor to receive $20,000 and the creditors to get the excess. However, if a debtor owns an automobile worth more than $8,000, it has been held that it is exigible and that, unlike the mobile home, the debtor gets nothing, not even the $8,000 "exemption."[47] It is possible that this difference in treatment was intended, but the reason for it is difficult to fathom.

i. Ease of Operation by Lay People

3.22 Creditors' remedies legislation must often be interpreted, at least initially, by lay people, such as employers calculating amounts payable pursuant to a garnishee summons, or bailiffs deciding what goods are to be seized. One would hope that the legislation would therefore be sufficiently clear and simple that non-lawyers could, perhaps with some effort, understand it. Unfortunately, this legitimate hope is often misplaced.

3.23 We earlier discussed the difficult task of the employer trying to comply with his or her obligations upon receipt of a garnishee summons.[48] The bailiff's position is no better.

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[46] R.S.A. 1980, c. E-15.

[47] *Re General Steel Wares Ltd. and Clarke* (1956), 20 W.W.R. 215 (Alta. D.C.); *Public School Employees' Savings and Credit Union Ltd.* v. *Haluschak* (1964), 49 W.W.R. 504 (Alta. D.C.).

[48] *Supra*, c. 2, para. 2.137.

3.24 In Rodi and Wienenberger H.G. v. Kay,[49] Chief Judge Buchanan commented on two subsections of the Exemptions Act as follows:

> It must be conceded that bailiffs if they are acting in conformity with the restriction thus placed upon them, *viz*, that no exemptions must be seized, will necessarily be persons of outstanding talent. One wonders for example how a bailiff upon visiting a farm debtor with a warrant in hand, looking over the debtor's stock, fowl, grain, vegetables, dairy and agriculture produce to determine the debtor's statutory exemptions can possibly decide the numbers or quantity which "will be sufficient either themselves or when converted into cash to provide:
>
> "2(c)(i) food and other necessaries of life required by the execution debtor and his family for the next ensuing twelve months,
>
> "(ii) payment of any sums necessarily borrowed or debts necessarily incurred by the execution debtor
>
> "(A) in growing and harvesting his current crop, or
>
> "(B) during the preceding period of six months, for the purpose of feeding and preparing his livestock for market,
>
> "(iii) payment of current taxes and one year's arrears of taxes or in case taxes have been consolidated, one year's instalment of the consolidated arrears, and
>
> "(iv) the necessary cash outlays for the ordinary farming operations of the execution debtor during the next ensuing twelve months and the repair and replacement of necessary agricultural implements and machinery during the same period;"
>
> or equally difficult, how will a bailiff inspecting a farmer debtor's establishment, determined to avoid seizing exemptions, know just what

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[49] (1959), 22 D.L.R. (2d) 258 (Alta. D.C.).

> "horses or animals and farm machinery, dairy utensils and farm equipment [are] reasonably necessary for the proper and efficient conduct of the execution debtor's agricultural operations for the next ensuing twelve months;"
>
> as set out in s. 2(d) of the Act? The problem thus confronting a Sheriff or his bailiff might well test the combined skills of a dietitian, an agriculturist and a chartered accountant.[50]

The sections analyzed by Buchanan C.J.D.C. remain in much the same form in the present Act.[51]

j. Ignorance by Debtors of Their Rights

3.25 Under the present law, debtors have a wide range of legal and practical options. They can defend any action brought against them or apply in certain circumstances to open up a default judgment.[52] They can assert exemptions of goods from execution or of income from garnishment. A notice of objection to the sale of seized goods can be filed.[53] Debtors can at any time seek the assistance of the Family Financial Counselling Service or of a lawyer. Finally a debtor in serious financial difficulty can avail himself of the Orderly Payment of Debts system[54] or assign into bankruptcy.[55]

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[50] Supra, note 49, at pp. 262-63.

[51] R.S.A. 1980, c. E-15, s. 1(1)(c) and (d), although the sheriff's burden was somewhat eased by the addition of the present s. 7 in S.A. 1966, c. 95, s. 3.

[52] Alberta Rules of Court, r. 158.

[53] Seizures Act, R.S.A. 1980, c. S-11, ss. 26-30.

[54] Bankruptcy Act, R.S.C. 1970, c. B-3, Part X.

[55] Bankruptcy Act, supra, note 54, s. 31.

3.26 Some of these rights are beyond the scope of the present study. Others, such as the right to keep exempt goods, should operate automatically if the sheriff's office is diligent. However the debtor's right to seek advice and, if necessary, the protection of the Bankruptcy Act is effective only if the debtor knows about it. There is research which suggests that many debtors are not aware of their rights and are reluctant to seek professional advice.[56] We will address this problem later in this report.

k. Continuing Wage Attachment Order

3.27 Earlier in the report,[57] we outlined the present requirement that, in order to attach successive pay cheques of a debtor, it is necessary to serve a series of garnishee summonses on his employer. We noted the costs and complexities occasioned by this rule and suggested that we should consider changing the Alberta Rules of Court to provide for a continuing garnishee summons which, when served on the employer, will catch successive income payments until the debt is discharged. The absence in Alberta law of such a remedy for creditors generally[58] is another example of the technical clumsiness which typifies much of Alberta creditors' remedies law.

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[56] Ramsay Report, pp. 174-75.

[57] Supra, c. 2, paras. 2.135-2.140.

[58] The Domestic Relations Act, R.S.A. 1980, c. D-37, s. 29 presently provides for a continuing garnishee summons for disputes litigated under that statute.

1. Conclusion

3.28 The above examples, and many others might have been chosen, illustrate what the Ontario Law Reform Commission described as "the generally haphazard and unsatisfactory development of debtor-creditor law."[58] Our interest in the technical confusions of the Alberta creditors' remedies system does not simply reflect a desire for an orderly and comprehensible legal system. Incoherence in our law has immediate practical consequences for litigants and for society as a whole.

3.29 When legal rules are uncertain, the costs of the system are substantially inflated. Duplication of procedures, legal opinions and chambers applications all increase the expense and the delays in the process which hurt not only the parties to the litigation but society as a whole.

3.30 Another danger of a confused and incoherent creditors' remedies system is that it makes more difficult the job of the lay people, particularly sheriffs and their officers, who have to apply the law. Speaking of the seizure and sale process, the Ontario Law Reform Commission noted the piecemeal quality of the law, and the gaps in the rules, filled occasionally by the Legislature but more commonly left open. They drew two conclusions which we think are also true of the Alberta situation:

> In the first place, the lacunae in the law require the sheriff to supplement the existing law with practices expressly sanctioned neither in the statutes nor in the regulations. This development may serve to discourage vigorous enforcement measures from being taken. Put in another way, this

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[58] Ont. L.R.C. Report, vol. 2, p. 1.

> practical requirement may well breed excessive caution on the part of enforcement officials, a circumspection resulting from a desire to avoid the unwitting commission of an illegality or irregularity.
>
> A second implication, derived from the first, is that gaps in the law, filled by informal or even formalized practices, not infrequently will promote divergent enforcement methods by different offices throughout the Province. This problem is prevalent and acknowledged today.[60]

Similar observations might be made about Alberta clerks of the court, land titles offices or employers responding to garnishee summonses.

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[60] Ont. L.R.C. Report, vol. 2, p. 2.

CHAPTER 4. DEBTORS AND CREDITORS: IMAGES AND REALITY

a. Introduction

4.1 In this chapter, we will examine the large body of research on the kinds of debtors who are likely to get into legal trouble, as well as the creditors who make use of the legal system. We will then compare the empirical research on debtors with the common images of them as scoundrels, inadequate people or victims. The purpose of our discussion is to come to a realistic assessment of the phenomenon of debtor default before embarking on reform proposals.

4.2 At the outset of a discussion of creditors' remedies, it is useful to draw a distinction between consumer and non-consumer credit.[1] By "consumer credit," we mean credit advanced to an individual so that he or she can obtain goods or services for his own use. The definition excludes credit exchanged for goods and services to be used in a business venture or for the production and sale of goods and services. Real property mortgage credit is also often excluded from the scope of consumer credit.

4.3 It is generally agreed that the use of consumer credit has increased substantially since the Second World War. With the introduction of bank cards and retail account cards, consumers received limited lines of credit and were encouraged to use them. They took advantage of the invitation, as reflected by the rise in consumer credit outstanding in Canada between 1949 ($77 per capita) and 1980 ($1,700 per capita).[2]

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[1] There is much literature on the distinction. For a useful summary, see Parker, pp. 6-7.

4.4 A consumer may borrow or buy on credit for a variety of reasons.[3] There is sometimes an economic advantage to buying a washing machine over time, rather than using a laundromat. There may be non-economic advantages in buying large goods, like a car, immediately and paying for them later. There is an obvious administrative convenience in using a credit card to avoid carrying around large amounts of cash.[4]

4.5 For the poor, the use of credit is somewhat less rational and voluntary. Fortin, in a study of low income consumers in Quebec, made the following observations:

> For the majority of families (60%) the net total income was below the $4,500 necessary to fulfil their needs. To them credit appears as a means of increasing their income and of permitting the satisfaction of felt needs. This being the case, the lower the income the greater the amount of credit that had to be used. In the same way, the use of credit also increased the longer the income had been below the norm. (This was true of the rural population). It was in this lower income group that a state of chronic indebtedness was found and that the financial condition of the family tended to deteriorate. Far from being a kind of *a posteriori* saving, credit was an incurable

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[2] Laskin, Gertner, Reiter, Springman and Trebilcock, *Debtor and Creditor: Cases, Notes and Materials* (2nd ed., 1982), p. 1, hereafter Laskin Casebook.

[3] The following analysis is drawn from Parker, at pp. 8-14.

[4] The increase in consumer credit does not necessarily translate into an increase in *contested* creditor-debtor litigation. For an argument that contested debt litigation has actually decreased since World War II, and an analysis of the reasons for this decrease, see Kagan, "The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts" (1984), 18 Law and Soc. Rev. 323. See also Adler, "Debt Enforcement and the Courts--West Germany and Great Britain Compared," unpublished paper.

> sickness leading directly to some kind of bankruptcy. A part of future income is used to satisfy immediate needs. But since future income is already too low to satisfy future needs the gap will increase - and therefore also the need for increased amounts of credit. It is a kind of vicious circle.
>
> What is very important is that we found not only that budget planning was absent in these families, but that it was psychologically impossible. It is impossible in this type of situation to determine an order of priority in the goods desired. Everything which is lacking is defined as equally pressing and equally necessary. Every need has the same priority, and it is more or less the whim of the moment which will lead to credit use and credit buying. In very low income families this may cause completely incoherent behavior.[5]

Fortin summarized his study as follows:

> Except for a minority of middle and upper income families, modern credit is a way for the poor consumer to act as if he were not poor. It is also a way for him to become poorer.[6]

4.6 A study done for the Canadian Council on Social Development agrees with Fortin. The writers conclude as follows:

> The literature suggests that the use of credit has changed over the years. In the past, credit was used more to acquire larger items and thus was more discretionary in nature. The consumer made a choice: he could postpone purchase of the goods until he had saved the necessary funds, or he could incur a debt, which would be paid at a later date, and enjoy the use of the goods immediately. We now find that credit is used more for small loans or cash advances and the purchase of basic necessities. It is less a matter of choice. This is especially true for lower income families whose income cannot accommodate the purchase of goods which require a large, lump-sum payment. For these

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[5] Fortin, "The Social Meaning and Implications of Consumer Credit," in Ziegel and Olley, Consumer Credit in Canada (1966), p. 32.

[6] *Ibid*., p. 33.

> families, the level of debt that they have incurred represents the extent to which they must rely on credit to finance the purchase of their "needs" whether imputed or otherwise.[7]

4.7 At the same time as total indebtedness has been increasing, there has also been a sharp rise in consumer bankruptcies. In 1967, consumer bankrupts numbered 7.6 per 100,000 population; in 1977 this figure jumped to 54.8 per 100,000; and in 1979 it rose to 75.5 per 100,000. More recent statistics confirm a continuation in this trend as well as an escalating use of credit counselling agencies.[8]

b. Characteristics of Consumer Debtors

(1) Generally

4.8 A significant proportion of the unsecured judgments enforced in Alberta arise out of consumer credit transactions. Consumer debtors have been much studied in the past twenty years, and the results of these studies are relevant to any attempt to reform the law of creditors' remedies. The research typically examines the demographic characteristics and financial circumstances of a particular debtor group (e.g., consumer bankrupts in Canada) and compares the findings to society as a whole. The percentages vary, but the studies give a roughly similar picture of the typical consumer debtor.

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[7] Frazer and McClain, Credit: A Mortgage for Life (1981), p. 119, hereafter Frazer and McClain. See also Parker, pp. 189-95.

[8] Brighton and Connides, Consumer Bankrupts in Canada (1982), p. 5, hereafter Brighton and Connides. See also Parker, pp. 127-36.

4.9 Two limitations to the following discussion should be noted. The first is that most of the research on which it is based concentrated on those debtors whose obligations resulted from consumer purchases. It must be remembered that small and large businesses also get into financial trouble, especially in times of recession. Some insolvencies will be administered by a trustee in bankruptcy or a receiver, but many businesses, particularly small firms and companies, are dealt with under provincial law. The different characteristics of business debtors should not be overlooked in proposing reforms of a system which must deal with both consumer and non-consumer debtors.

4.10 The second qualification is that most of the studies discussed below were completed before the present recession. Similar research performed today might find that the debtor population now includes a higher percentage of consumers with good educations and what would have been reliable long-term careers, were it not for the recent economic upheaval.

(2) Profile of the Typical Default Debtor

(a) Age and Marital Status

4.11 Default debtors range across the demographic spectrum, but they tend to cluster in three distinguishable categories. The most common group consists of married men in their late twenties or early thirties, supporting a family of two or more children. The other distinct categories of default debtors are single adults under 25 years of age and single parent families.[9] All three groups include individuals in the early stage of working life where consumer needs are high and wages relatively low. The individuals are often inexperienced and naive about the use of credit.[10]

(b) Education

4.12 The level of education attained by a default debtor is usually quite low. For example, Puckett's study of wage garnishment in Ontario found that only 5% of the debtor group possessed any education beyond high school, whereas three-fifths had not finished high school and one-third had not progressed beyond grade nine.[11] The low level of education is relevant because a positive relationship has been observed to exist between level of education and income earned. Only a small percentage of university graduates are in the lowest income brackets and more than one-half of those in the highest income brackets are university graduates. The reverse is true for people who have only completed elementary education: they comprise the highest percentage of people in the lowest income brackets and the lowest percentage of people in the highest income brackets.[12]

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[9] Brighton and Connidis, p. 73. Single adults were 15% of the sample and single parent families were 20%. See also Ramsay Report, pp. 123, 125-26; Scot. R.R. #5, p. 3; Scot. R.R. #6, pp. 9-15.

[10] Brighton and Connidis, p. 22.

[11] Puckett, p. 106. Ramsay's figures, based on a small Alberta sample, showed 60% not having completed high school, 23.3% having completed high school and 16% with further education after high school. See Ramsay Report, p. 128.

[12] Canadian Consumer Loan Association, 1974 Canadian Consumer Credit Factbook (1974), p. 19.

(c) Employment

4.13 The majority of default debtors are blue-collar workers, usually in the unskilled or semi-skilled labourer categories. The professional, management and skilled segments of the work force are greatly underrepresented. One sample of consumer bankrupts indicated that 30% were employed in factories and 40% were employed in the transport and construction industries.[13] In another study of debtors who had been subjected to wage garnishment or seizure of assets, 62% were listed as unskilled labourers.[14] An unskilled worker is unlikely to obtain a significant increase in income, with the result that escape from debt problems is unlikely.[15]

(d) Instability

4.14 There is a high degree of change or instability associated with default debtors. Not only do they move more frequently (the vast majority are renters, not home owners[16]) but there is a tendency to change jobs often.[17] One researcher found that one-half of the debtors in his study had changed jobs in the previous six months and only one-quarter had been in the same job for three years or more.[18]

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[13] Brighton and Connidis, p. 24.

[14] Trebilcock and Shulman, pp. 415, 426. See also Ramsay Report, pp. 126-28; Scot. R.R. #5, pp. 3-4.

[15] Jacob, p. 49.

[16] Percentages of home owners vary from 9% (Frazer and McClain, p. 18) to 37% (Ramsay Report, pp. 128-29). Frazer and McClain also refer to data from the Alberta Consumer Relations Division for 1978-79 which show only 16% of debtors in the sample as owners. See also Trebilcock and Shulman, p. 432.

[17] Brighton and Connidis, p. 29.

4.15 Instability is also evident in the marriages of default debtors. Two studies, one dealing with debtors whose wages had been attached or assets seized[19] and the other dealing with consumer bankrupts,[20] found that 20% of the default debtors were separated or divorced. At the time of the studies, only about 5% of the adults in the population at large were listed as separated or divorced.

(e) Unemployment

4.16 A high percentage of default debtors are unemployed. In Brighton and Connidis' study of consumer bankrupts in Canada, 30% of those filing through private trustees and 60% of those filing through FITA[21] were unemployed.[22] Trebilcock and Shulman's study of debtors who had wages attached or assets seized reports that 25% of the debtors were unemployed, with one-half of those having been so for more than six months.[23] Considering that the national rate of unemployment at the time of the Brighton and Connidis study was 8.3%[24] and the local unemployment rate at the time of Trebilcock and Shulman's study was 7%, it is readily apparent that the percentage of unemployed default debtors is significantly more than in the general population.[25] A majority of default debtors are employed within the manufacturing and construction industries which traditionally have higher rates of unemployment.[26] In addition, the low level of education, instability of life-style and lack of skills of default debtors limit the job options available to them.

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[18] Trebilcock and Shulman, p. 426.

[19] Loc. cit.

[20] Brighton and Connidis, p. 74.

[21] The Federal Insolvency Trustee Agency (FITA) was established in 1972 to make bankruptcy available to those bankrupts who could not afford a private trustee. The programme came to an end in 1979.

[22] Brighton and Connidis, p. 27.

[23] Trebilcock and Shulman, p. 427.

[24] The rate was obtained from the Alberta Treasury, Bureau of Statistics, Alberta Statistical Review - Second Quarter 1984 (August, 1984), p. 29.

(f) Income

4.17 The income of default debtors tends to be lower than the income of the general population. Eighty per cent of the subjects in one study had an income between $5,000 and $15,000 (1977),[27] while in another the majority earned less than $12,000 (1979).[28] To put the typical debtor's income into perspective, one study reported that 40% of the families earned less than the average single income in Canada and 80% of the families earned less than the average family income in Canada.[29] A study in 1980 of personal, including some business, bankrupts in nine U.S. states found that one-third had an income below the poverty line, 62% had an income below the "lower living budget," which is above the poverty line but leaves no disposable income for other than necessities, and only 16% of the bankrupts reached the median family income of $21,000.[30]

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[25] Trebilcock and Shulman, p. 427. See also Scot. R.R. #6, pp. 9-15.

[26] Canadian Consumer Loan Association, supra, note 12, at p. 14.

[27] Brighton and Connidis, pp. 31, 73.

[28] Frazer and McClain, p. 18. See also Scot, R.R. #5, p. 5.

[29] Trebilcock and Shulman, p. 428.

4.18 On the other hand, Ramsay found that the debtors in his sample had only "a slightly lower than average household income."[31] The majority of his debtors were in the middle to lower middle income groups with minorities in the low income and upper income groups. It is likely that the average income level of debtors whose wages are garnisheed will be somewhat higher than the average income for the whole population of debtors, some of whom are not working.

(g) Debts

4.19 The extent of indebtedness of most default debtors is not very high. For example, the median debt load of the consumer bankrupts in one study was found to be approximately $11,000 per person. The researchers concluded that "the amount of indebtedness [of the consumer bankrupts in their sample] is not extremely high in most cases, particularly in comparison to other families in similar stages of the family life cycle."[32] The vast majority (95%) of the individual debts making up the debt load were for consumer or personal purposes; only a small percentage were mortgage debts or personal guarantees for business.[33] Typically, the liabilities consisted of several debts (a median of about seven) involving two or more large consumer loan debts (i.e., $2,500 or more) and several smaller debts to department stores and retailers.[34]

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[30] Shuchman, "The Average Bankrupt: A Description and Analysis of 753 Personal Bankruptcy Filings in Nine States" (1983), 88 Comm. L.J. 288, 306, hereafter Shuchman.

[31] Ramsay Report, p. 124, but cf. pp. 130-34.

[32] Brighton and Connidis, p. 43.

[33] Brighton and Connidis, p. 43. Frazer and McClain, at p. 18, say that, in 1978 and 1979, the average debt level per case in the Ontario debtor's assistance programme was $8,274 and the median income was $11,030.

4.20 Ramsay, in his file study of garnisheed debtors, found that a majority were being sued for more than one debt at the same time, and a significant minority (14.2%) had four or more actions proceeding against them at the date of the garnishee. Seventeen per cent of the debtors in his sample were being garnisheed in separate actions at the same time. Ramsay concluded that, while the majority of debtors may be "one-shotters," there is a minority who have recurring debt suits.[35]

(h) Assets

4.21 Brighton and Connidis' study found that consumer bankrupts possessed few or no assets which yielded money for distribution by the trustee. The median level of the value of assets after exemptions was found to be appropr imately $400. Furthermore, 19% of private and 44% of FITA files showed no assets after exemptions, while 53% of private and 85% of FITA files showed assets of less than $1,000. Only 6% of the cases yielded $2,000 or more.[36]

4.22 Since the median level of the trustee's realized assets was so low, it is not surprising that in only 32% of the cases was anything left over to distribute to creditors after the trustee's fees had been deducted. Of the 32% of cases where anything remained, the total amount available for distribution ranged between $100 and $250. It is apparent that, in most cases where a debtor files for bankruptcy, all creditors lose.[37] One may also conclude that, in most cases, any real estate, furniture or vehicles are secured by creditors or are exempt from seizure. Any other assets either have been liquidated to pay debts or are goods with little resale value.[38]

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[34] Brighton and Connidis, pp. 44, 54.

[35] Ramsay Report, pp. 164-74. See also Parker, pp. 196-99; Scot. R.R. #5, pp. 7-8.

[36] Brighton and Connidis, pp. 43, 60, 63.

(i) Consumption Patterns

4.23 Debt delinquency is related not only to socioeconomic characteristics but also to distinctive consumption patterns. In the past, credit was used to purchase larger items, but now it is frequently used to obtain small loans, cash advances and basic necessities. Since default debtors often have larger families to support on modest incomes, they have little choice but to use credit. Default debtors' high level of debt represents their dependence on credit to purchase necessities.[39] For example, there is no difference between ordinary debtors and delinquent debtors as to the purchase of cars and furniture; both rely on credit to the same extent. However, delinquent debtors rely more on credit to purchase items such as televisions, appliances and clothing.[40]

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[37] Brighton and Connidis, p. 76 and in Introduction.

[38] Brighton and Connidis, pp. 43, 60.

[39] Frazer and McClain, p. 119.

[40] Jacob, p. 52.

(3) Reasons for Default

(a) Introduction

4.24 Various reasons can be offered to explain why default debtors get into trouble. Some insolvencies can be attributed directly to the debtors' mismanagement of their financial affairs while others are by and large beyond their control. One important conclusion that can be drawn from the following discussion is that only a small percentage of all debtors wilfully refuse to pay their debts.

(b) Substantial Change in Income

4.25 The primary reason for debtors defaulting on payments is that they have suffered a substantial change in income as a result of unemployment, injury, illness, termination of seasonal or casual employment, a spouse out of work because of pregnancy or loss of job, marriage break-up or a combination of these factors. Many families are dependent on two wage earners to meet their financial obligations, and they will be susceptible to default if either of the wage earners is unable to continue working.[41] Most of these factors are beyond the control of the debtors.

4.26 It was noted earlier that the income level of default debtors is usually low. Not all low income families have financial problems; a large portion of them are able to meet their needs without incurring substantial debt.[42] However the incidence of problem indebtedness for poor families is greater than for other families in Canada. Almost 15% of poor families[43] have difficulties with debt, compared to 8.1% of all families. When a poor family is faced with unemployment or some other difficulty, debt problems are more likely to occur because of the combination of low income and the immediate crisis.[44]

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[41] Mathews, Causes of Personal Bankruptcies (1969), p. 87, hereafter Mathews. See also Scot. R.R. #6, pp. 24-28.

[42] Frazer and McClain, p. 25. The debt profile for poor families differs from that for all families in Canada. For

4.27 After the disaster occurs, debtors often begin to use credit for goods previously purchased with cash. If the problem continues, debtors find they are no longer able to continue borrowing from more conventional sources (e.g., chartered banks) and may be forced to borrow from more expensive sources of credit, such as finance companies.[45] The upshot is a substantially greater likelihood of default.[46]

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[42] (cont'd) example, in 1976, 58.9% of families with incomes under $7,000 and 49% of families with incomes under $11,000 had no debts, whereas 26.6% of all families in Canada had no debts. 8.5% of families with incomes under $7,000 and 11.8% of families earning less than $11,000 had total debts over $10,000, but 34.7% of all families in Canada had total debts over $10,000.

[43] Based on the poverty level established by the Canadian Council on Social Development for the year 1976. See Frazer and McClain, p. 25.

[44] Parker, pp. 189-95.

[45] The Annual Report of the Supervisor of Consumer Credit for the Province of Alberta (1981) reports that the cash loan area of the consumer credit field is currently dominated by chartered banks and credit unions. In 1971, banks held 51% and finance companies 21% of outstanding consumer credit, whereas by 1981, banks accounted for 68%, credit unions 25% and finance companies only 7% of the consumer credit market. Brighton and Connidis found that about 74% of their sample of consumer bankrupts owed at least one debt to a finance or acceptance company, and 61% owed money to a bank or banks. Somewhat less than half the sample owed at least one debt to department stores (46%) and other retailers (41%). See Brighton and Connidis, in the Summary. Also see Shuchman, pp. 294-302.

[46] Ramsay Report, pp. 140-47.

(c) Mismanagement

4.28 The second most common reason for defaulting on debts is mismanagement of finances. Both Puckett's study of wage garnishment in Ontario and Mathews' study of personal bankruptcies found that 26% of the debtors in their samples defaulted because of poor financial management.[47] By and large this group of debtors intended to repay but, because they handled their finances poorly, they allowed the level of debt to get out of hand and were forced into default.

4.29 It has been suggested that a ratio of debt to income of approximately 10-15% is a safe level for people to carry. The debt-income ratio for default debtors is usually considerably higher. In Mathews' study, 84% of the sample had debts in excess of 50% of their annual income.[48] The Canadian Council on Social Development's study of clients in the Ontario debtor's assistance programme found that 62% of the clients had debts in excess of 50% of their annual income and 25% of the clients owed more than 100% of their income.[49]

4.30 The level of excessive debt in relation to ability to pay builds up for several reasons. First, debtors in a lower socio-economic class are more likely to have poor money management skills. They lack the ability or knowledge required to manage finances adequately and to avoid an excessive build-up of debt.[50] For example, the majority of debtors in one study admitted that they gave no thought to budgeting and only a very few (9%) bothered to keep written records of their income and expenditures.[51] Without some sort of planning, it is not surprising that debtors with modest incomes get into financial difficulties.

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[47] See Mathews, pp. 73-76, 87; Puckett, p. 108.

[48] Mathews, pp. 56, 58, 76.

[49] Frazer and McClain, p. 18.

[50] Brighton and Connidis, in the Summary.

4.31 Secondly, default debtors often do not realize their precarious financial situation and neglect to seek credit counselling or other assistance soon enough. Only a small percentage of the bankrupts in the Brighton and Connidis study had tried debt counselling agencies before filing for bankruptcy. It is often not until debtors are sued or harassed by creditors that they realize the seriousness of their financial situation but, by then, the state of indebtedness is usually too advanced to resolve without drastic measures such as bankruptcy.[52]

4.32 Some mismanagement can be attributed to inefficient shopping as a result of impulse buying and an indifference for comparative shopping. One researcher discovered that only one-half of the debtors in the study entered a store with the intention of buying the specific item which they bought and knowing the price of the item at other stores at the time of purchase. The others made purchases even though they had no intention of doing so before entering the store, often without knowing the price of the item elsewhere.[53]

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[51] Mathews, p. 80.

[52] Brighton and Connidis, p. 37 and in the Summary.

[53] Trebilcock and Shulman, p. 433.

(d) Creditor Related Reasons

4.33 Frequently debtors default on payments because of some action or inaction on the creditors' part. Puckett's study found that 22% of the defaults in his sample occurred because of such problems.[54] Some creditor related reasons for debtor default were the shoddiness of the merchandise sold, deceptive sales practices, problems with warranties, payment misunderstandings where debtors claimed that some payments were not recorded or that bills were incorrect, or harassment by the creditor.[55] In all of these cases, the debtors were unwilling to pay because of their dissatisfaction with the goods or services provided rather than for any other reason.[56]

4.34 Debtors often compound the problems discussed in paragraph 4.33 by failing to confront creditors at the time of a wrong billing or when they discover that the merchandise is faulty. Instead of acting promptly to rectify the situation, many debtors do nothing with the result that their creditors proceed to judgment and enforcement without understanding the real reason for nonpayment. Puckett's study of wage garnishment contains an interesting account of debtors' reactions to receiving a summons commencing action.[57]

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[54] Puckett, p. 108. See also Scot. R.R. #6, pp. 27-28.

[55] Caplovitz, p. 53. See also Ramsay Report, p. 139.

[56] National Consumer Council and Welsh Consumer Council, Consumers and Debt (1983), p. 40, hereafter National Consumer Council.

[57] Puckett, pp. 133-34.

(e) Creditors

4.35 Part of the responsibility for consumer defaults can be attributed to the credit granting industry itself. The dramatic increase in consumer credit outstanding between 1967 (8.6 billion dollars) and 1981 (48.1 billion dollars) shows the willingness of creditors to grant credit. Creditors have not exerted sufficient effort to attempt to recognize consumer insolvency and refuse additional credit. It often takes several years for debts to accumulate to the point of insolvency, but creditors continue to grant consolidation or cash loans during the accumulation period, even when it is evident that the debtor's financial situation is precarious.[58]

4.36 The liability structure for a typical consumer bankrupt suggests that even high risk clients are able to obtain credit readily. It is typical for a bankrupt's debts to include two or more large consumer loan debts (over $2,500) and several smaller debts to department stores and retailers. Brighton and Connidis found that three-quarters of the bankrupts in their sample had at least one loan with a finance company, and more than one-third had two or more loans with finance companies.[59]

(f) Guarantors

4.37 Sometimes individuals co-sign as guarantors to enable friends or relatives to obtain financing. When the principal borrowers default, the guarantors are held responsible for the balance of the debt. Puckett found that 6% of the debtors in his study owed debts as a result of being guarantors. Many guarantors defaulted because they did not realize they were liable for the whole debt; others refused to pay because they had received no benefit from the transaction.[60]

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[58] Brighton and Connidis, p. 77 and the Summary.

[59] Brighton and Connidis, p. 54.

(g) Wilful Defaulters

4.38 A small percentage of debtors incur debt with no intention of paying it off or display such an irresponsible attitude towards repaying debts that, in effect, they deliberately default. One study[61] determined that wilful defaulters comprised 15% of the group, while another[62] placed the figure at 13%.

(4) Conclusion

4.39 The profile of default debtors described above shows that they do not fit "the stereotype of 'high rollers walking away from their debts' while holding on to substantial assets."[63] Nor do real debtors accord with the image of people going bankrupt "in style."[64] Rather, they are primarily working class phenomena.[65]

4.40 The typical default debtor is likely to be a married man in his late twenties or early thirties with a family of two or more children. He usually has a low level of education and is working as an unskilled or semi-skilled labourer for relatively low income in an occupation where there is a higher tendency than in the general population to become unemployed. He owns few assets of value, and his financial problems are caused by a relatively modest level of debt built up almost exclusively from personal consumer purchases or loans.

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[60] Puckett, p. 109.

[61] Trebilcock and Shulman, p. 434.

[62] Mathews, p. 80.

[63] Brighton and Connidis, p. 76.

[64] Brighton and Connidis, p. 75.

[65] Brighton and Connidis, in the Summary.

4.41 Many debtors get into trouble because they have suffered an unexpected drop in income as a result of unemployment, marriage break-up, illness or similar crisis. Financial mismanagement and refusal to pay a debt because of some creditor related action are the other major reasons for debtors defaulting on payments. It is often the case that a few hundred dollars more per month would enable debtors to remain solvent and meet their financial obligations but, because of unemployment or lack of education or skill, they are unable to escape from their present situation and earn enough income to pay their debts. The mounting cost of credit exacerbates an already difficult situation.

4.42 One study indicates that many debtors in serious financial trouble either ignore or are unaware of their situation until they are threatened with a lawsuit or are actually sued. Only then do they take steps to protect themselves, such as assigning into bankruptcy.[68] In view of the small amounts normally recovered by the trustee for distribution and the preferential treatment awarded to secured and preferred creditors, the resultant bankruptcy will usually produce little or nothing for the unsecured creditor.

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[68] Brighton and Connidis, p. 75.

4.43 Since the reasons for default indicate that it is only a small percentage of debtors who wilfully default on their payments, the majority of default debtors should not be thought of as scoundrels who are trying to beat the system, but as individuals who would like to meet their financial obligations but for a variety of reasons are unable to do so. In a balanced discussion of the literature, Parker concludes that, in the majority of cases, debtor default has resulted from some degree of inability to pay, amounting to "diminished payment capacity but not total incapacity." In the balance of the cases, default has arisen from an unwillingness to pay, sometimes justified (e.g., by creditor action) and sometimes not.[67]

c. The Creditors

4.44 It is not intended to say much about the creditors who form the other half of the relationship explored in this report. Creditors are very diverse, ranging from commercial lenders of money or vendors of goods or services on credit on the one hand, to individuals who have commenced an action in debt or damages and have gone to judgment.[68] There is some evidence that creditors who proceed to enforce their judgments are more often commercial enterprises than individuals.[69]

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[67] Parker, p. 67. Ramsay divided his sample of debtors whose wages had been garnisheed into four groups: (1) the chronically unfortunate repeat player (12.5%), (2) the unfortunate one shot player (55%), (3) the "amoral" defaulter (10%), and (4) the one shot unjustified debtor (22.5%). See Ramsay Report, pp. 176-81. See also Kelly, p. 3.

[68] There are statistics on the division of the consumer credit market among various types of lender and vendor creditor. See e.g., Frazer and McClain, pp. 49-57.

[69] Ramsay Report, pp. 49-53, 134-39. See also Scot. Memo 47, pp. 137-38, 144; Scot. R.R. #1, pp. 13-18, 31;

4.45 Students of the credit industry have noted differences among creditors in their credit granting policies and their use of the remedies available to them. David Caplovitz found that certain types of creditors were more prone to employ garnishment than others and that these same creditors (direct sellers, low income retailers, finance companies) were the ones who used high pressure tactics to sell their goods and resorted to strong measures to collect their debts. He identified two strata of creditors:

> One class consists of those who use high-pressure tactics to sell their goods and resort to strong measures to collect their debts. The other class consists of creditor-plaintiffs who are more ethical in their business dealings and less prone to resort to harsh collection measures, perhaps because they are concerned with the goodwill of their customers and/or do not view default-debtors as a source of profit. The picture that emerges from these findings is that garnishment is more often relied on by the less ethical creditor-plaintiffs. If this analysis is correct, its implications are profound. It would seem that the law places a powerful collection weapon in the hands of those who least deserve it, those firms likely to engage in deception at the time of the sale and undue harassment when the debtor, perhaps because he feels that he has been cheated, stops making payments.[70]

4.46 Professor Dunlop cites Herbert Jacob's study of Wisconsin finance companies to the same effect.

> [Jacob's study] led him to conclude that some companies use wage garnishment more extensively than other creditors do because they make more marginal loans. "Indeed, they are often the last commercial source of credit for the debtor in financial trouble." These companies were prepared from the beginning of the loan to use wage garnishment

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[69] (cont'd) Scot. R.R. #2, pp. 6-8, 16; Scot. R.R. #3, pp. 10-12, 37-40, 42-43.

[70] Caplovitz, p. 236. See also Scot. R.R. #8, pp. 32-35.

> and would begin collection efforts almost as soon as the debt became delinquent.[71]

4.47 The aggressive creditor who lends to an already overcommitted person is a danger, not only to the debtor, but also to the existing creditors who may have advanced credit responsibly at a time when the debtor was a sound risk. If the aggressive creditor resorts immediately to legal remedies, he or she may bring down the debtor's economic house of cards. Yet the Execution Creditors Act[72] draws no distinction between "good" and "bad" creditors when it comes to dividing the fruits of execution or garnishment.

4.48 Iain Ramsay, in his report to the Institute, observes that most creditors in consumer credit transactions fall into the category of the repeat player in the legal system, that is, "a unit which has had and anticipates repeated litigation, which has low stakes in the outcome of any one case, and which has the resources to pursue its long run interests."[73] Some advantages of this status are that the creditor can structure the initial transaction so as to prepare for litigation, adapt the collection procedure to the demands of the legal system, and develop useful relationships with the clerks and sheriffs who operate the remedial system.[74]

4.49 Another way of putting the point is to say that, at every stage in the relationship of consumer debtor to his creditor, there is an inequality of knowledge, experience and power in favor of the creditor. Caplovitz expresses this argument dramatically:

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[71] Dunlop book, p. 9, citing Jacob, p. 80.

[72] R.S.A. 1980, c. E-14.

[73] Ramsay Report, p. 33.

[74] Ramsay Report, pp. 33-39, 182-86.

> The central theme of this book is the injustice that has evolved in this impersonal world of consumer credit - injustice that stems from the basic inequity between the buyer and the seller, the debtor and the creditor. To write about injustices perpetrated upon consumer-debtors is not to say that persons in this position do not sometimes take advantage of the seller-creditors. (In the view of the credit industry, the creditors are almost invariably the victims of "deadbeat" debtors when the system breaks down.) But, as we shall see, a number of debtors who end in default were victimized in the initial transaction because of fraud and error on the part of their creditors. In spite of these extenuating circumstances, few debtor-defendants had their "day in court." On the contrary, the machinery of justice in the consumer field serves almost exclusively the interests of the creditors - the unscrupulous as well as the reputable ones.[75]

It is not intended at this point to decide if this disturbing description is an accurate account of Canadian law. We will return later to the theme of inequality in the creditors' remedies system.

d. Images of the Debtor and Their Effect on Law Reform

4.50 In the first part of this chapter[76], we reviewed the literature on characteristics of consumer debtors. The conclusion reached in the studies, as summarized by Parker, is that most cases of debtor default result from some degree of inability to pay, amounting to "diminished payment capacity but not total incapacity." In the balance of the cases, default has arisen from an unwillingness to pay, sometimes justified (e.g., by creditor action) and sometimes not.[77]

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[75] Caplovitz, pp. 9-10. See also Cuming, "Protection of Consumer-Borrowers - Limitations on the Remedies of Consumer-Lenders" (1968), 33 Sask. L.R. 58, 72-74; Parker, pp. 146-51.

[76] Supra, paras. 4.8-4.34.

4.51 Our review of the empirical literature, including Ramsay's study prepared for the Institute, leads us to agree with Parker's assessment. In most cases, consumer debtors[78] do not pay because, to a greater or lesser extent, they are unable to do so in the short run. In some of those situations, the financial problems of the debtor are chronic and, for practical purposes, inescapable, except for the relief afforded by the Bankruptcy Act.[79] In a minority of cases, the debtor has willingly refused to pay, even although he or she has the means to do so. Even here, the debtor may be able to claim a moral if not a legal justification by pointing to some act or omission of the creditor.

4.52 It is important to be clear about the characteristics of the typical default debtor before making proposals for reform. Much judicial and legislative lawmaking has been predicated on the contrary assumption that debtors are scoundrels with hidden resources who wilfully refuse to honor their just obligations. A good example of this attitude is the casual observation by Riddell J., made in the course of a judgment on examinations in aid of execution:

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[77] Parker, p. 67. See also Ramsay Report, pp. 176-81.

[78] The studies on which we base our conclusions largely concerned consumer debtors, although there is some evidence that many small business debtors would not be different. See Shuchman article in Table of Abbreviated References.

[79] R.S.C. 1970, c. B-3.

> The difficulty in the way of compelling an unwilling debtor - *and most debtors are unwilling* - to pay a judgment against him was notorious and a blemish on the Common Law of England.[80]

Such evidence as we have suggests that many debtors fully understand their obligations but are unable, not unwilling, to honour them.

4.53 More recently, the image of the debtor as knave may have been replaced in part by the image of the debtor as inadequate person. For example, the Payne Committee, discussing people who were imprisoned for debt, concluded as follows:

> We have received a considerable amount of evidence from those engaged in welfare and social services that many of the debtors who, in fact, go to prison are inadequate men who are incapable of managing their own affairs; they are men who have become overwhelmed by a burden of debt through illness, unemployment or other misfortune; they are irresponsible or feckless people who need control or temporary help, or many other types for whom imprisonment under the Debtors Act was certainly not intended. Although no specific statistical survey has been made of debtors in prison, the opinion set out above is strengthened by the views expressed by Mrs. Pauline Morris in her book entitled *Prisoners and Their Families* published in 1965. The author says, for example, of imprisoned debtors " . . . we were left with an overriding impression of the low mental calibre of these men . . . . Apart from knowing little or nothing about the details of their indebtedness or their financial position generally they were often unable to give coherent accounts of their employment history."[81]

Ramsay observed that the approach to debtors as inadequate people seemed to be generally held by employees of the Family Financial

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[80] *Beau Monde Ladies' Tailoring Co.* v. *Garrett* (1925), 57 O.L.R. 256 (emphasis added).

[81] Payne Committee, p. 251.

Counselling Service of the Government of Alberta.[82]

4.54 A third competing image, much discussed in the literature, is that of the debtor as a victim or casualty of the economic and social order. For example, Gerald Fortin, writing in 1966, concluded as follows:

> It is thus without any desire of following the poverty cult that I say that to find a solution to the evils of modern credit is really to find a solution to the existence of poverty in an economy of abundance or to find a solution to the problems of a society which is not yet modern. . . . It is because the poor are the main users of credit that one cannot eliminate the bad effects of credit without eliminating poverty.[83]

On this view, the blame for debtor default can be visited, not on the debtor, but on an economic system which has treated him or her unfairly.

4.55 It is apparent that each of these images of the debtor is an ideal type, unlikely to be found in its pure form in the real world. Despite the theoretical nature of these images, they are important because they have influenced and continue to influence our thinking about law reform.[84]

4.56 If, for example, one assumes that debtors, for the most part, are scoundrels, then what is needed is a harsher, more coercive debt collection system. This attitude was commonly expressed to Ramsay by lawyers who responded to his questionnaire. When asked what reforms should be made in the law of debt collection, those who replied tended to say that the system should be made more pro-creditor. Typical responses were:

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[82] Ramsay Report, pp. 41, 47-48.

[83] Quoted in Ramsay Report, p. 45.

[84] Ramsay Report, pp. 39-48.

> More fair treatment of creditors. Debtors seem to get away with murder.
>
> Less red tape; tougher collection procedures.
>
> Just do something to eliminate the ease with which debtors either escape from justice or abuse the judicial system - whatever it takes.[85]

4.57 If the typical debtor is viewed instead as an inadequate personality who is unable to handle credit, the appropriate reforms will be very different. Consumer education or mediation schemes, often on a compulsory basis, are likely responses. The Payne Committee's major recommendation was that the existing debt collection system should be replaced with a state enforcement office which would exercise a much greater degree of control over the remedial process.[86] The common element in these various ideas is that the debtor and, to some extent, the creditor need to be supervised and educated by the state to a greater extent than at present.

4.58 The image of the debtor as victim has led in various directions. It can be a springboard to radical political and economic reform or to across the board temporary solutions such as moratorium legislation.[87] Alternatively it can lead to caution in reform proposals. Trebilcock's writing on consumers' and creditors' remedies in the early 1970s argued that, as the basic problem of the poor was poverty, and as Canadian society had shown no desire to attack that evil in any fundamental way, reformers should be cautious in proposing legal changes which might actually worsen the plight of the poor.

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[85] Ramsay Report, "Lawyers' Questionnaire" (unpaginated). Lawyers may get a somewhat jaundiced view of debtors because of the kind of collection file they handle. Creditors will make every effort to collect their own debts and will incur legal expense only if the debtor resists all efforts to pay and yet appears to have assets.

[86] Payne Committee, pp. 80-144.

4.59 In one paper[88], Cayne and Trebilcock quote with approval the following passage by David Caplovitz:

> In the final analysis, the consumer problems of low-income families cannot be divorced from other problems facing them. Until society can find ways of raising their occupational opportunities, increasing their income, and reducing the discrimination against them - in short, until poverty itself is eradicated - only limited solutions to their problems as consumers can be found.[89]

Cayne and Trebilcock comment as follows:

> A principal thesis of this article is that, outside the general social and economic policies elaborated by Caplovitz in this paragraph, few solutions, limited or otherwise, can be found to the consumer problems of the poor by ad hoc restrictions on the flow of market forces. The consumer problems of the poor are an inherent consequence of paucity of resources and can only be remedied by augmenting those resources, that is, by making the poor not poor. They are not for the most part a result of aberrations in the market process and, beyond making it freer, cannot be cured

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[87] An idea which has recently been advanced in Alberta and Saskatchewan to prevent farm foreclosures. There is a long history of moratorium legislation on the prairies.

[88] Cayne and Trebilcock, "Market Considerations in the Formulation of Consumer Protection Policy" (1973), 23 U. of T.L.J. 396, hereafter Cayne and Trebilcock.

[89] Caplovitz, The Poor Pay More (1963), p. 192, quoted in Cayne and Trebilcock, p. 430.

> by ad hoc interferences with it. We have attempted to show that to try to solve the problems of the poor, and indeed any class of consumer, in this way in fact usually makes them worse.[90]

Despite the all or nothing tone of these passages, Trebilcock has elsewhere found it possible to recommend substantial changes to creditors' remedies law.[91]

4.60 We earlier expressed the view that a majority of debtors are, in the short run, simply unable to pay. Their current embarrassment may flow from a change in their situation not of their making (e.g., unemployment, injury) or from mismanagement, but the common result is a real inability to meet their obligations. Some debtors are chronically unable to solve their problems, even in the long run. A minority of debtors are capable of paying their debts but for a variety of reasons refuse or neglect to do so. The problem is to devise a legal system which deals fairly with these various types of debtors, as well as the creditors to whom money is owing.

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[90] Cayne and Trebilcock, p. 430.

[91] E.g., Trebilcock and Shulman, pp. 453-67.

CHAPTER 5. FUNDAMENTAL CRITICISM OF THE PRESENT LAW

a. Introduction

5.1 The Alberta system of creditors' remedies is similar in principle to those in place in England, Scotland, other Canadian provinces and, with modifications, the United States and Australia. It is therefore important to examine the large body of literature which has, over the past twenty years, developed fundamental criticisms of these systems and has proposed basic and radical reforms.[1] Writers and law reformers have attacked the very roots of the remedial structure, instead of simply pointing out the technical ineptness of the law, as we did in chapter 3.

5.2 In this chapter, we will draw together and summarize these critical policy arguments. We will then describe four major alternatives proposed to the present law of enforcement of judgments. Our response to these criticisms, and our general approach to reform of the Alberta law, will be the subject of chapter 6.

b. Criticisms of the Present Law

5.3 The Globe and Mail of Thursday, March 28, 1985[2] contained a digest of a report of the National Council of Welfare on the subject of poverty in Canada. The Council revealed that 4.1 million Canadians, or 17% of the population, live below the poverty line, an increase of 660,000 Canadians in just two years. One in seven families in Canada is now considered to be poor.

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[1] Citations appear through this chapter.

[2] P. 5.

The Council also observed that the ranks of the poor in the prairie provinces had increased to 157,000 by 1983, up from about 118,000 in 1980.[3]

5.4 The fact of poverty in Canada is relevant to the reform of creditors' remedies. The empirical studies discussed in chapter 4[4] make it clear that the poor are more prone to debt problems than the affluent. Many poor people live without getting into serious difficulties, but they are more likely to do so. The less income and resources that a family has, the more likely that a small setback will bring down its economic house of cards.

5.5 The critics of the present remedial system build on this relationship between debt and poverty. They find the law to be fundamentally unfair in its attempt to extract money from people who, by and large, are unable rather than unwilling to pay.[5] They note that the creditors have greater knowledge, experience and power than the debtors and are better able to manipulate the remedial system[6] which in any event caters to their needs rather than acting as a neutral arbiter between creditor and debtor.

5.6 The present reliance of the remedial system on threats and coercion[7] is unacceptable, particularly in light of the fact that most people do not pay because they cannot. It is unfair to impose hurtful processes on people, especially the poor, who are not responsible for their default. More significantly, a system relying on threats enables creditors to extract payments or compromise agreements from debtors which are unrealistic in light of the debtors' financial situation.

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[3] The Council concluded that Western provinces were hardest hit by the increase in poverty, as were "unattached" people such as widows or single mothers.

[4] Supra, paras. 4.11-4.23.

[5] Supra, paras. 4.8-4.43, 4.50-4.51.

[6] Supra, paras. 4.44-4.49.

[7] Supra, paras. 2.194-2.202.

5.7 Debtors who have the resources will want to repay their debts out of a sense of moral responsibility or because of a fear of getting a lower credit rating and therefore more limited access to credit. If a debtor wilfully refuses to pay, it is often because the goods or services have not been satisfactory or because the debtor has some other complaint arising out of the creditor's conduct.

5.8 We earlier noted the criticism that the present remedial system often exacerbates the breakdown of communication between debtor and creditor which leads to unnecessarily protracted and fruitless litigation.[8] The legal system makes little or no effort to discriminate between debtors who cannot pay and debtors who have resources but who refuse to pay, either because of a perceived defence or for some other reason. Creditors often exercise poor judgment and pursue too many hopeless cases because of lack of information and bureaucratic rigidity. Debtors, because of ignorance and fear, fail to seek help or to invoke the protection of the Bankruptcy Act.

5.9 The critics of the present law have not hesitated to recommend major changes in the remedial system.[9] Their basic proposals, given different emphasis by various writers, are as follows:

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[8] Supra, paras. 2.203-2.207.

[9] Reformers have usually stopped short of proposing actual or virtual abolition of the creditors' remedies system, although cf. Ison, "Small Claims" (1972), 35 M.L.R. 18.

(1) Compulsory mediation or arbitration of debt disputes. This proposal is intended to encourage the flow of information between debtor and creditor, to insert a neutral mediator or arbitrator who will help to keep the discussion fair and productive, and to remove debtor-creditor conflicts in whole or in part from the courts.

(2) State screening of debtors. The intention is to create a judicial or administrative agency whose purpose will be to interview individual debtors to determine the appropriateness of specific remedies, or indeed whether the judgment should be enforced at all.

(3) Limitation or abolition of creditor control. For a state screening system to work, it is necessary to limit or abolish creditor control over the choice of remedies and the frequency of their use. Northern Ireland has for fifteen years operated a legal system in which the creditor has almost no control over the enforcement process except for the initial decision to file the judgment with the Enforcement Office. We will examine the Northern Ireland system in some detail later in this chapter.

(4) Preference of Some Remedies. Most reform proposals urge that some remedies, such as instalment orders or continuing wage garnishments, be preferred to remedies like seizure and sale which are seen as needlessly disruptive and harmful.

(5) State Assistance for Debtors. If the debtor-creditor relationship is typified by an inequality of knowledge and experience between debtors and creditors, then efforts should be made to correct that imbalance by providing assistance for debtors who would otherwise be at a disadvantage in most cases.

5.10 These proposals have been developed into several carefully articulated alternatives to the present remedial structure. We will next describe four of these proposals, reserving our comments to chapter 6.

c. Compulsory Mediation

5.11 Mediation schemes[10] in the context of creditor-debtor relations appear to secure two purposes:

(1) They provide an opportunity to discover valid defences to the claim. Mediation in this sense is outside the scope of the present project.

(2) They may be used as a forum to exchange information about the debtor's means with a view to working out a rational repayment schedule. Mediation used for this purpose is relevant and must be examined here.

5.12 An influential paper proposing a mediation element in debt collection law is Arthur Leff's "Injury, Ignorance and Spite - The Dynamics of Coercive Collection."[11] Much of Leff's essay is taken up with a game theory analysis of the effect of costs and the role of information in creditors' remedies.[12] For our purposes, Leff's argument can be summarized as follows:

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[10] In the following discussion, we are concerned only with compulsory mediation schemes, i.e., mediation as a required step in creditor-debtor litigation.

[11] (1971), 80 Yale L.J. 1 (hereafter Leff). There is an interesting symposium on the Leff essay in (1971-72), 33 U. Pitts. L.R. 667 (hereafter Leff symposium).

(1) Present American collection mechanisms and institutions are grossly inefficient, specifically because they do not provide a smooth and clear flow of information between creditor and debtor about each other's intentions, the debtor's means and possible collection costs.

(2) It is too expensive for the parties to make the collection process more individualized.

(3) But better communication between creditor and debtor is so important that the government should provide (i) a conversation pit for creditor and debtor, and (ii) an impartial referee to assist the conversants.[13] Professor Leff hoped that the cost of the proposed reform would not be excessive in view of the benefits to be gained.

5.13 The idea of a refereed conversation pit between debtor and creditor has been taken up by others, but we can concentrate on the proposal made to us by Professor Ramsay.[14] While in draft form, the Ramsay mediation scheme sets out enough detail that it is possible to reach a conclusion about it. The essence of the scheme can be summarized as follows:

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[12] Leff's intention seems to have been to work out a theoretical puzzle rather than to do empirical research or to make a carefully thought out reform proposal. See his acidic comments on one empirical study (by Caplovitz), his admission of thin factual underpinnings and his cheerful modification of his reform proposal in the Leff symposium, pp. 667-72.

[13] Caplovitz agreed with the substance of the Leff proposal. See Leff symposium, pp. 679-81.

[14] Ramsay Proposals, pp. 5-11.

(1) "There ought to be one court and one procedure for recovering individual debts.... A reformed Small Claims Court ought to be the exclusive forum for debt actions (up to say $5,000)."[15] Insofar as this proposal deals with pre-judgment procedure, it is outside the scope of the present report.

(2) "A general objective will be to reduce what must appear to many debtors to be the coercive and formal nature of the process and to attempt to address what we indicated to be the real issue in most disputes - the organization of an appropriate repayment schedule."[16]

(3) Proceedings would be commenced by a summons which would urge the debtor to phone the court office to arrange an initial mediation session. The summons would also advise the debtor to contact the creditor directly and would indicate the debtor's right to defend.

(4) The mediation session, held at a convenient time, would bring together the parties with a trained court mediator. The purpose of the first meeting, which might take no longer than thirty minutes,[17], would be to reach a realistic orderly repayment schedule. Such a schedule would become a consent judgment of the court. If mediation failed, the parties would proceed to court.

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[15] Ramsay Proposals, p. 6.

[16] Ramsay Proposals, p. 7.

[17] Ramsay based the figure on the reported experience of a similar program in the state of Maine.

(5) The mediator would be more than a passive observer. He or she might urge the parties to settle. Where an inexperienced debtor was faced by an experienced creditor, the mediator might spend more time informing the consumer of his position and "may have to play a more positive role in negotiations."[18] However "we do not . . . expect the mediator to impose a settlement on the parties."[19]

(6) Where debtors have multiple debt problems, they would be referred to the Family Financial Counselling Service for help on budgeting and debt repayment, and would be advised of the possibility of bankruptcy.

(7) When a debtor claimed a defence or otherwise refused to pay, "a good mediator, eliciting the background to a case from both parties, ought to be able to present a balanced set of alternatives to a debtor."[20] If complex issues of fact or law arose, the mediator or judge (of the Provincial Court) would be able to transfer the case to a judge of the Court of Queen's Bench.

(8) Ramsay recognized that many debtors might neglect or refuse to attend the mediation session. He did not decide the issue whether the debtor should be compelled to attend, but left it to the Institute to consider.

> On one hand it may be to the debtor's benefit to bring him to court and to set a realistic repayment schedule rather than to simply permit a creditor to go ahead with enforcement procedures after a debtor's

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[18] Ramsay Proposals, p. 9.

[19] Loc. cit.

[20] Ramsay Proposals, p. 9.

> non-attendance. Interviews with debtors suggest that they underestimate the potential effect on them of the subsequent use of coercive remedies. On the other hand it may be argued that forcible apprehension criminalises the process of debt collection and is paternalistic.[21]

Ramsay did not comment on the parallel problem of the creditor who does not attend the mediation session.

(9) Ramsay also made some comments on instalment judgments and on remedies which will be considered later.

5.14 Ramsay thought that the informality and participatory character of mediation might lead to a settlement perceived to be fair by both parties.

> The opportunities for misunderstanding are less than in the intimidating atmosphere of a court and a debtor will at least have the opportunity to comprehend the situation and to understand the obligations which he is required to meet as a consequence of the mediation . . . . We think that all disputes ought to be automatically referred to mediation. This might have the added benefit of reducing the burden on the courts by sifting out many actions.[22]

5.15 The issue of compulsion, on which Ramsay hesitated, is the crucial element of a mediation scheme. For the purposes of the discussion in this chapter, we assume that the proposal is that mediation be compulsory for debtor and creditor in a debt action.[23]

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[21] Ramsay Proposals, p. 10.

[22] Ramsay Proposals, p. 8.

[23] Ramsay would apparently confine the mediation requirement to actions under $5,000 which must be heard by Provincial Court.

d. Arbitration

5.16 The mediation schemes described above add a new step to the present system of creditors' remedies, but otherwise leave that system untouched. In this section, we describe a more radical proposal to replace the courts by arbitrators in uncontested and, to some extent, contested debt actions.[24] Adler, Wozniak and Tweedie consider the mediation model described by Leff but reject it on the ground that "the majority of debtors are not only in no position to play the game envisaged by Leff [but] are not even interested in playing it.[25] The failure of creditors and debtors to make agreements with each other has little to do with the bargaining process, and more negotiation will not improve matters. What is needed is "a form of arbitration as an alternative to coercive collection [i.e., the present law]."[26] "This system of arbitration is premised upon the willingness of the majority of default debtors to repay their debts and the inability of many default debtors to do so on terms that are acceptable to the creditor."[27]

5.17 McCreadie lists several principles on which his version of the arbitration model is based. The key provisions for our purposes are as follows:

> (a) Debts which have been incurred ought to be repaid. But this principle should

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[24] See Adler article, pp. 15-23; McCreadie, "A Model Debt Procedure" (1985), unpublished paper written for the Scottish Consumer Council but not yet adopted by the Council, hereafter McCreadie paper.

[25] Adler paper, p. 15.

[26] Loc. cit.

[27] Loc. cit.

> admit of exceptions when (a) the debtor's personal circumstances are such that he should not be expected to repay immediately or at all, or (b) the creditor has acted illegally or unfairly.
>
> . . . .
>
> (c) The main function of a debt procedure ought to be to secure repayment on terms which are fair and reasonable. It ought not to be to determine whether or not money is owed, as most debtors willingly acknowledge their indebtedness.
>
> (d) An efficient debt procedure ought to involve a proper investigation of the debtor's means. In exceptional cases it ought also to involve an investigation of the circumstances in which the debt was incurred, to determine whether the debtor was misled about the amount of his indebtedness.
>
> . . . .
>
> (g) The expense of debt procedure ought not to be borne by the debtor. (At present the fact that the debtor must pay the creditor's legal costs means that the debt frequently increases as a result of legal proceedings).[28]

5.18 The basic elements of the arbitration model are as follows:

(1) All financial claims against individual consumers would be dealt with by a Debt Arbitration Service which would include arbitrators, and an advisory and counselling service. The arbitrators would be trained and paid but, as arbitration would not normally involve decisions on legal matters, they would not have to be lawyers.

(2) Once a creditor had registered his claim with the Service, it would contact the debtor, inform him or her of the claim, and require the completion of an accompanying form giving

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[28] McCreadie paper, p. 1.

details of income and expenditure. The Service would also inform the debtor of the subsequent procedure, and would advise him or her to seek the advice of the counselling service.

(3) If the debtor chose to contest the debt, the debt would "either be forwarded to the courts for adjudication or resolved in an adversary hearing before [the Service]."[29]

(4) In all other cases, the dispute would be dealt with by the Service. The parties would be encouraged to enter into a voluntary repayment agreement. The objective would be to encourage the debtor to repay the debt but, at the same time, to protect the debtor from over-extension and undertaking payments beyond available resources.[30]

(5) If a voluntary agreement could not be reached, the dispute would be set down for an informal hearing by an arbitrator. The parties would be either required or "strongly encouraged"[31] to attend. Legal representation would be discouraged or prohibited.

(6) The arbitrator would consider the financial information supplied by the debtor, information about the debt from the creditor, and any report from the counselling service. The arbitrator would then, at his discretion, issue a compulsory repayment order which would set a repayment schedule and might include a continuing garnishment order against the debtor's wages, bank account or social security cheque. Orders to seize

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[29] Adler paper, p. 16. McCreadie would send all disputed cases to the Sheriff Court for decision.

[30] Loc. cit.

[31] Loc. cit.

and sell the debtor's property would be either prohibited or sharply limited, although the debtor might be "advised to sell some of his possessions to repay the debt, or to return the item concerned to the creditor."[32]

(7) An arbitrator would have the power to suspend the operation of a repayment order, or to vary its terms. He or she could also order that payment be delayed until, for example, the debtor obtained work, or could simply declare the debt to be unenforceable where the debtor had no likelihood of getting resources to repay the claim.

(8) The cost of the Service would be spread among all creditors or all taxpayers, but would not be borne directly by the debtors.

5.19 Stripping the Adler-McCreadie proposals of their anti-lawyer bias, their basic characteristic is that the arbitrator would take the debtor's liability as a given[33] and would focus on the real issue of repayment. "Creditors will lose their rights to negotiate with default debtors and engage in coercive collection, but in return would deal with debtors whose repayment plans were based on a realistic assessment of their financial circumstances and were backed by compulsory measures in the event of their defaulting on the voluntary plan."[34] The hope is that the arbitration model would be more efficient, less costly and fairer to all parties than the present remedial system.

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[32] Loc. cit.

[33] Unless he disputed liability.

[34] Adler paper, p. 18.

e. Judgment Hearing Process

5.20 In 1976, the Australian Law Reform Commission was asked to consider certain questions relating to debt default. Its first report on the subject was Report No. 6: Insolvency: The Regular Payment of Debts,[35] tabled in Parliament in 1977. For our purposes, the principal recommendation in Report No. 6 was the creation of the Regular Payment of Debts (R.P.D.) Program.[36]

5.21 The Program, intended for consumer debtors, provided for payment of debts over a period of up to three years. The debtor would make a proposal to the creditors for the payment of all debts by regular instalments. The proposal would be accepted or rejected by majority vote of the creditors. Once the scheme was in effect, legal proceedings would be stayed. Unlike Part X of our Bankruptcy Act,[37] the total debt load need not always be paid off, and the balance might be discharged. In this respect, the R.P.D. Program bore some relationship to the proposed consumer arrangements sections in the Canadian Bankruptcy Bill.[38]

5.22 During the course of the Australian Commission's consideration of Report No. 6, it became clear that it should also look at state and territorial debt recovery procedures. The result was Discussion Paper No. 6: Debt Recovery and

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[35] Hereafter Aust. L.R.C., Report No. 6.

[36] The following discussion is primarily based on Tearle, "Consumer Bankruptcy and Debt Law Reform" (1980), 10 Queensland Law Soc. J. 261, hereafter Tearle paper.

[37] R.S.C. 1970, c. B-3, ss. 188-213.

[38] Report No. 6 refers to the Tassé Committee Report and to the Bankruptcy Bill, 1975 (Can.), Bill C-60.

Insolvency,[39] published in 1978. The Discussion Paper recommended major changes in creditors' remedies law in Australia.

5.23 We are informed that credit providers were critical of the costliness of the proposals in Discussion Paper No. 6, as well as the invasion of privacy involved.[40] The Commission is currently developing its final report and is considering the recommendations in the Discussion Paper as well as less radical alternatives. We however remain interested in Discussion Paper No. 6 because it represents another proposal for major change, whether or not the Australian Commission resiles from it in its final report.

5.24 The Discussion Paper begins with the assertion that "a person should pay his just debts and [that] the law should provide creditors with an effective means of recovering those debts when default has occurred."[41] However that goal is substantially limited by other competing values, including the following:

(1) An ideal recovery system should not concentrate on enforcement but "should try to discover the reason for a debtor's default" and tailor recovery procedures "to the circumstances of the individual debtor."[42]

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[39] Hereafter Aust. L.R.C., Discussion Paper No. 6.

[40] Correspondence from William J. Tearle, Senior Law Reform Officer, Australian Law Reform Commission. A somewhat similar proposal was advanced earlier in the Dore and Kerr Report, but was not accepted by the New Brunswick government. We will concentrate here on the Australian proposal but will return to Dore and Kerr in c. 6 of this report.

[41] Aust. L.R.C., Discussion Paper No. 6, p. 9.

[42] Loc. cit.

(2) The law should recognize that default often occurs without the debtor being at fault.

(3) A debtor's obligations towards his or her dependants "must be acknowledged and respected."[43]

(4) Enforcement procedures should, as far as possible, impose obligations on debtors directly rather than on third parties "including employers and bailiffs."[44]

5.25 The basic proposals in Discussion Paper No. 6 are as follows:

(1) Prior to commencement of legal proceedings, a credit provider would be required to notify the debtor of the R.P.D. Program.

(2) The creditor would commence an action by a summons served by ordinary mail and expressed in "simple language."[45] The summons would require the debtor either to defend or to attend for examination at the nearest court. The debtor would also be told that he or she might make an arrangement to discharge the debt by instalments paid directly to the creditor. The effect would be that the proposed summons would serve the dual function of an initial summons leading to a default judgment together with an examination summons, at least for those debtors

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[43] Loc. cit.

[44] Aust. L.R.C., Discussion Paper No. 6, p. 10.

[45] Aust. L.R.C., Discussion Paper No. 6, p. 34. The Paper (at p. 18) quotes a Victorian study which indicated that the default summons in that state "requires reading skills associated with advanced secondary or some tertiary education," far beyond the level of most judgment debtors. Also court documents were available only in the English language. Similar conclusions could be reached in Alberta.

who chose not to defend.

(3) The examination hearing would generally take place before any enforcement proceedings were embarked upon. Hearings would be arranged at times convenient to the debtor, e.g., in the evening. The debtor who failed to attend would either be notified of a second date for examination, or a warrant would be issued to apprehend the debtor and bring him or her before the court for the examination.

(4) The officer conducting the hearing[46] would first inquire as to the debtor's means. The debtor who proved to be insolvent would be told again about the R.P.D. Program and would be invited to seek debt counselling. Further proceedings might be stayed.

(5) For those debtors who were not accommodated within the R.P.D. Program, the court would decide what, if any, enforcement order it should make. Unless it appeared that the debtor was unwilling or "inexcusably unable"[47] to comply with an instalment order, the prime means of debt recovery should be an instalment order made by the court after considering the debtor's means, ability to pay the debt, and obligations to other creditors. The law should contain clear guidelines limiting the court's discretion to grant the instalment order and to set the amount of the instalments. A court might conclude that no enforcement order, including an instalment order, should be made in light of the debtor's circumstances.

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[46] It is not clear to us whether the initial examination as to means is to be conducted by a judge or by a court clerk. Apparently subsequent enforcement orders are to be made by a judge.

[47] Aust. L.R.C., Discussion Paper No. 6, p. 19.

(6) Where an instalment order was inappropriate or where the debtor violated its terms, the court might order another form of enforcement, such as execution or garnishment. A court should be empowered to order the consolidation of multiple orders in respect of the several debts of a particular debtor. The Discussion Paper contained several recommendations about the remedial procedures available to the court.

5.26 The judgment hearing process recommended by the Australian Law Reform Commission involves more than a mere screening of debtors. The scheme gives to the court the discretion to decide whether and how a judgment will be enforced. In order to exercise that discretion, all judgment debtors must be examined by the court or a court official[48] as to their assets, and unwilling debtors must be hauled into court for that purpose. This displacement of the creditor's control over the enforcement of his judgment is also a feature of the Northern Ireland Enforcement Office, to be discussed in the next section.

f. The Enforcement Office

(1) The Anderson Committee Report

5.27 In 1963, a committee was struck to consider the system of enforcement of judgments, orders and decrees in Northern Ireland. The Committee, hereafter called the Anderson Committee after its chairman,[49] reported in 1965.[50] It recommended sweeping changes in the remedial system, most of which were implemented in the Judgments (Enforcement) Act (N.I.) 1969.[51] The Northern Ireland Enforcement Office is interesting to us because it is the only example (in an Anglo-American jurisdiction) of a proposal for radical reform of creditors' remedies which has actually been implemented and has continued in operation for a substantial period of time. As such, it merits close scrutiny.[52]

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[48] Supra, note 46.

[49] Master Alfred E. Anderson.

[50] Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland (1965).

5.28 The Anderson Committee began by describing the law of enforcement of judgments as it existed in Northern Ireland at the time. That system was criticized on grounds of delay, inefficiency, ineffectiveness and cost. The Committee singled out the sheriffs' bailiffs for special attention:

> The main cause of inefficiency in execution by seizure is in the bailiffs. They are, generally speaking, men of poor standing and intelligence. They do not enjoy a good reputation and have neither the goodwill nor confidence of the parties or of the general public. It seems clear that in a fair number of cases they make a return of "no goods" where goods do, in fact, exist.[53]

5.29 The Committee painted a picture of a totally ineffective and unacceptable enforcement system in need of fundamental reform. "In our view any attempt to patch a system of enforcement which is so bankrupt of productive results is worse than useless."[54] The Committee therefore proposed a new enforcement system with three fundamental characteristics:

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[51] 1969 (N.I.), c. 30. See now Judgments Enforcement (N.I.) Order 1981 [SI 1981/226 (N.I. 6)].

[52] We are concerned in this chapter with the Anderson Committee and the Payne Committee reports only as to the broad principles underlying the enforcement office. We will return to these reports in c. 6 for assistance on our more detailed recommendations.

[53] Anderson Committee, p. 11.

> (a) An easy method of ascertaining the credit-worthiness of a prospective debtor is provided, thus discouraging the reckless and irresponsible giving of credit.
>
> (b) By basing the system on the principle that it is wasteful, expensive and illogical to adopt any form of enforcement until some preliminary investigation has been made of the financial circumstances of the judgment debtor, and by providing that a judgment debtor shall be compelled to divulge his financial circumstances, the problem of enforcement in a particular case is more logically approached and easily solved....
>
> (c) A wide choice of forms of enforcement should be freely available so that the most appropriate one may be adopted at once; the choice of the appropriate form would rest with an officer of the State or Court so that such choice and the subsequent proceedings would be fair to the judgment debtor.[55]

5.30 The Committee proposed that a bill be introduced which would furnish "a complete and comprehensive code relating to the enforcement of judgments."[56] The administrators of the system should be responsible to the government, and the system should be state-controlled. All remedies currently available should be abolished and replaced by a new set of remedies.

5.31 The central proposal was that an office be created which would be solely responsible for the enforcement of judgments. The jurisdiction of the courts in Northern Ireland to make orders for the enforcement of judgments was, with some exceptions, to be transferred to the Enforcement Office. The

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[54] Anderson Committee, p. 15.

[55] Anderson Committee, p. 16.

[56] Anderson Committee, p. 15.

Office was also to maintain a public register of judgments, the theory being that people would search before extending credit. The Committee Report went on to discuss in some detail the jurisdiction of the Enforcement Office and the nature of the new remedial system.

5.32 The proposals of the Anderson Committee were largely accepted by the government and incorporated into the Judgments (Enforcement) Act (N.I.) 1969.[57] Since 1969, the Enforcement Office has been the subject of one review committee which reported in 1976,[58] and another review committee was appointed in 1985,[59] primarily as a result of complaints by creditors and their solicitors. However the substance of the 1969 legislation continues in force today,[60] and we have not heard of any desire in Northern Ireland to go back to the pre-1969 enforcement system. We turn now to an account of the Enforcement Office as it presently operates in Northern Ireland.[61]

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[57] Supra, note 51. For comments on the original legislation, see Hadden (1970), 120 New L.J. 277; Trimble (1970), 21 N.I. Law Q. 359.

[58] Report by a Working Party on Judgments Enforcement and Debt Recovery (1976).

[59] Under the chairmanship of Master John Hunter, of the Supreme Court.

[60] The current legislation is the Judgments Enforcement (N.I.) Order 1981 [SI 1981/226 (N.I. 6)]. The legislation will be referred to below as Order 6. Procedural rules and fee schedules have been promulgated pursuant to the above Orders. Our discussion of the Enforcement Office is also based on discussions which Professor Dunlop held with officers of the Enforcement Office and the Northern Ireland Court Service, with Master John Hunter, chairman of the committee currently reviewing the Office, and with creditors, solicitors and professors in Belfast who are interested in the Office.

[61] Like all other issues in Ulster, the Enforcement Office has been affected by the political turmoil of the past fifteen years. See Payment for Debts (Emergency Provisions) Act

(2) The Northern Ireland Enforcement Office

5.33 The Enforcement Office is part of the Northern Ireland Court Service, day to day control being placed in the Chief Enforcement Officer.[62] The judicial powers taken from the courts by Order 6 and conferred on the Office[63] are exercised by duly qualified officers of the Supreme Court designated for that purpose, particularly a Master of the Court. The Office employs a number of enforcement officers and clerical staff, most of whom are based in Belfast.

5.34 The procedure for enforcing a debt is as follows:

(1) After obtaining judgment in the courts, the judgment creditor prepares and issues out of the Office a notice to the judgment debtor of intention to enforce the debt.[64] The notice must be served on the debtor who has ten days to comply with the terms of the judgment.

(2) If the debtor does not comply, the creditor may then apply to the Office to enforce the judgment.[65] The application

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[61](cont'd) (N.I.) 1971, c. 30; McWilliams and Morrissey, "Debt and Debt Management in Northern Ireland" (1983), unpublished.

[62] See Order 6, ss. 7-10. Much of the following account is based on a summary of Order 6 prepared by the N.I. Court Service.

[63] Order 6, ss. 11-13.

[64] Judgment Enforcement Rules (N.I.) 1981, No. 147, r. 6 (hereafter Rules).

[65] Order 6, s. 22. In 1984, some 27,500 notices of intention were filed in the Enforcement of Judgments Office. During the same year, some 7,683 applications for enforcement were lodged. There would appear to be a large number of creditors who file notices but do not take the next (and more expensive) step of applying for enforcement.

must be accompanied by the required fee which is intended to cover the entire enforcement process and is substantial. The 1980 fee schedule for filing an application for enforcement with the Office is as follows:[66]

On lodging an application for enforcement under section 18 of the Act:
in respect of each respondent
Where the sum due on foot of the judgment-

(1) does not exceed £200	30p in the £1 Minimum fee £6
(2) exceeds £200 but does not exceed £1,000	£60 plus £6 per additional £100 or part thereof of the sum due in excess of £200
(3) exceeds £1,000 but does not exceed £3,000	£108 plus £3 per additional £100 or part thereof of the sum due in excess of £1,000
(4) exceeds £3,000 but does not exceed £10,000	£168 plus £1 per additional £100 or part thereof of the sum due in excess of £3,000
(5) exceeds £10,000	£238 plus 50p per additional £100 or part thereof of the sum due in excess of £10,000

(3) Northern Ireland does not have a pari passu sharing regime as in Alberta's Execution Creditors Act. Judgments rank in order of serial numbers obtained at the stage of application for enforcement.[67] It is therefore important for a judgment

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[66] Judgment Enforcement Fees Order (N.I.) 1980 [SR 1980 No. 240]. The reference is to s. 18 of the 1969 Act, *supra*, note 51. The Anderson Committee (at p. 20) intended the Enforcement Office to be self-supporting, but it has never achieved that goal. In its best year (1984), because business increased, it collected about 1 million pounds in fees but paid out 1 1/4 million pounds. Unfortunately delays also increased.

[67] Order 6, s. 24.

creditor to know something about the number of creditors already registered in the Office and also the state of the debtor's finances before laying out the substantial fee payable on application. The Office permits a creditor to search their files to determine the number of creditors ahead of him or her in the lineup, the amounts of their judgments and any orders which have been made.[68] If the creditor's judgment exceeds £500, a report may be obtained from the Office as to the debtor's means.[69] If such a report is not obtained or if the creditor's claim is below £500, and if there are other creditors with prior judgments registered, a subsequent creditor is gambling that the debtor will have enough money to satisfy prior claims fully, leaving something left over for latecomers.[70]

(4) When an application for enforcement is accepted, the Office shall "forthwith" issue a custody warrant and serve it on the debtor. Thereupon all of the debtor's non-exempt goods are deemed to be in the custody and possession of the Office.[71] The goods are not yet seized,[72] but the effect on third party purchasers from the debtor is apparently intended to be the same.

(5) The next step is that the Office (not the execution creditor as in Alberta) conducts an examination of the debtor as

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[68] Order 6, s. 116.

[69] Order 6, s. 23. If a report was carried out on the debtor within the past six months, it can be used; otherwise a fresh report must be done. (Dennis Boyd, Queen's University of Belfast--unpublished notes).

[70] The Hunter Review Committee will consider whether a pari passu sharing rule should be added to the Northern Ireland legislation.

[71] Order 6, s. 25.

[72] Cf. Order 6, ss. 31-44.

to his means.[73] An enforcement officer may interview the debtor at home or business, or the debtor may be summoned to the Office to be examined under oath. The debtor who fails to attend or answer may be arrested and required to attend or, in default, committed to jail.

(6) When the examination is complete, the Office (not the creditor), in its discretion, may issue one or more of the following enforcement orders:[74]

(i) Instalment Order[75] - commonly used with self-employed debtors. The Chief Enforcement Officer indicates that he prefers this remedy to seizure and sale of goods.

(ii) Seizure Order[76] - permits seizure and sale of non-exempt goods.

(iii) Order Charging Land[77] - If the debtor owns land or an interest therein, the Office may charge that land, the charge being registered in the Land Registry. The remedy can be enforced by the creditor like a charge created on his or her behalf by the debtor, but the remedy is commonly used simply to secure the judgment debt against the debtor's land without actually being enforced.

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[73] Order 6, ss. 26-29. The Office can examine people other than the debtor under s. 28. Complaints are made that the examination is incomplete and less rigorous than the examination conducted in bankruptcy proceedings.

[74] Order 6, s. 16.

[75] Order 6, s. 30.

[76] Order 6, ss. 31-44.

[77] Order 6, ss. 45-52.

(iv) Order Charging Funds, Stocks or Shares in Public Company[78]

(v) Debenture Order[79] - available against debentures or mortgages of a local authority or other public undertaking or any public or private company in Northern Ireland.

(vi) Stop Order Against Fund in Court[80]

(vii) Restraining Order Against Shares in Private Companies[81] - Restrains payment of dividends or director's emoluments, or other dealings with the shares.

(viii) Order Appointing Receiver[82] - This remedy is commonly used to attach money which the debtor is about to receive from a third person, such as money due from the sale of real property, payments due from marketing boards, or the proceeds of a lawsuit in the Supreme Court.

(ix) Attachment of Debts Order[83]

(x) Attachment of Earnings Order[84] - The Office may, on the application of the creditor, make a continuing attachment of earnings order, with exemptions set in the order for each individual case.[85]

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[78] Order 6, ss. 58-60.

[79] Order 6, s. 61.

[80] Order 6, ss. 62-65.

[81] Order 6, s. 66.

[82] Order 6, ss. 67-68.

[83] Order 6, ss. 69-72.

[84] Order 6, ss. 73-79.

(7) The Office may conclude, after the examination of the debtor, that he or she is insolvent. In these circumstances, the Office has two courses of action:

(i) It may issue a notice of enforceability and, after giving debtor and creditor time to be heard, a certificate of partial or complete unenforceability.[86] The effect of issue of a certificate is that the Office will take no further action to enforce the judgment or any subsequent judgments, and that no further applications for enforcement will be accepted by the Office. The grant of the certificate constitutes an act of bankruptcy.

(ii) The Office may order a stay of enforcement for six weeks to enable the parties to apply under the bankruptcy legislation.[87] Failing such application, the Office will proceed with enforcement.

(8) Creditors are required to notify the Office if they receive money in payment of their claim.[88] Creditors can be required to attend at the Office.[89] Failure to do so, or to take steps such as applying for an attachment of earnings order,

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[85] The Chief Enforcement Officer relies on the supplementary benefits table to determine what amount of earnings should be exempt.

[86] Order 6, ss. 18-21. A certificate can subsequently be set aside (s. 21).

[87] Order 6, s. 14. See also ss. 80-87 (administration orders), 88-94 (bankruptcy).

[88] Order 6, s. 135.

[89] Order 6, s. 136.

entitles the Office to order that the priority of the uncooperative creditor be postponed to all other creditors.[90]

(9) Any party aggrieved by an order of the Enforcement Office has an appeal to the High Court.[91] We are told that relatively few appeals have been filed.

5.35 The size of the Enforcement Office operation can be gathered from the following statistics for 1984.[92]

Table E1

Applications and Oral Examinations

NATURE OF PROCEEDINGS	
Applications - Total	7474
Up to £200	1850
Over £200 up to £500	2148
Over £500 up to £1000	1401
Over £1000 up to £3000	1391
Over £3000 up to £10,000	572
Over £10,000	112
Applications for possession of land	191
Applications for possession of goods	18
Certificates of Award Lodged	498
Examinations under oath by nominated officers	1856

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[90] Order 6, ss. 136-38.

[91] Order 6, s. 140.

[92] Provided to us by the N.I. Court Service.

Table E2

Orders of Enforcement made by the Master

TYPE OF ORDER	
Seizure	143
Receiver	256
Attachment of debts	41
Restraining	77
Suspended Attachment of Earnings Order	172
Orders made following objection	-
Attachment of Earnings Order	-
Other Orders	285
Total	974

Table E3

Orders of Enforcement made by the Chief Enforcement Officer

TYPE OF ORDER	
Instalment	740
Authorisation to Seize	477
Charging Land	2269
Possession of land	221
Possession of goods	22
Liberty to Exercise Power of Sale	236
Provisional Attachment of Earnings Order	747
Other Orders	1177
Total	5889

Table E4

Stays of Enforcement (made by the Master)	101
Warrant of Arrest (made by the Chief Enforcement Officer)	603
Certificates of Unenforceability (made by the Master)	1517
Number of Debtors involved	983

Table E5

Money received from Debtors	2,793,955.25
Number of transactions	10,855

We are told that the volume of business done by the Enforcement Office has increased over the past few years.[93]

5.36 The Office appears to be remarkably successful in collecting the debts assigned to it. The following table, drawn from a useful paper by McWilliams and Morrissey,[94] shows the number of money judgments lodged for enforcement in 1978 and 1979, and the outcome as at October, 1982:

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[93] McWilliams and Morrissey, supra, note 61, estimate a 40% increase in applications for enforcement since 1979.

[94] Supra, note 61.

TABLE 10-MONEY JUDGMENTS	1978	1979
Application for Enforcement	5617	4940
Cases satisfied in full	2880 (51%)	2520 (51%)
Cases where action ceased (e.g. debtor disappeared, died)	400 (7%)	491 (10%)
Cases declared unenforceable	833 (15%)	866 (17.5%)
Cases unresolved.	1504 (27%)	1063 (21.5%)

The Chief Enforcement Officer told us that, for applications filed in 1981, 45% had been paid in full, 8% of actions had ceased (e.g., because the debtor had died or disappeared), 14% were unenforceable, and 33% of cases were still ongoing.[95]

5.37 It is interesting to compare these figures to the results of our empirical study of Alberta creditors' remedies.[96] That report concluded that, of 2316 money judgments obtained in 1980 and 1981, 731 judgments (or 31.6%) had by the summer of 1983 received partial or total recovery of the amounts owed. Because our study was limited to court files, it was not possible to say how much money was paid by debtors directly to their creditors. In contrast, the Northern Ireland Office claims between 45% and 51% total recovery. One may assume that partial recovery has been effected in the cases which remain open, which makes the record of the Enforcement Office even more impressive.

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[95] His figures were given to us in May, 1985. They include only the disposition of cases where applications for enforcement were made, but not the much larger group of cases where notices of intention were issued but no further step was taken. See supra, note 65.

[96] Dunlop Report, c. 10.

5.38 It is however important that the Alberta system handles significantly more business than does its Northern Ireland counterpart. The total number of applications for enforcement of judgments in Northern Ireland in 1982 was 7360.[97] There is no exactly comparable figure for Alberta. However the number of writs of execution filed in all Alberta sheriffs' offices for the year ending March 31, 1981 was 26,189, and for the year ending March 31, 1982 was 28,634.[98] These figures do not include (i) creditors who issue a writ of execution but do not file it in the sheriff's office, and (ii) creditors who issue a garnishee summons but no writ of execution.

5.39 In 1981, the population of Northern Ireland was about 1,556,000,[99] while the population of Alberta was 2,226,000.[100] Alberta has therefore a population about one-third larger than that of Northern Ireland, but its court system does roughly four times the amount of business handled by the Enforcement Office.

5.40 It is dangerous to speculate in a precise way on comparisons betwen jurisdictions, but it seems reasonable to assume that the difference in numbers of creditors using the two enforcement systems is, in part at least, related to the nature of the two systems. Three factors appear significant.

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[97] Figures supplied by N.I. Court Service. We have no comparable figure for 1981.

[98] Attorney General of Alberta, Annual Report: Year-End March 31, 1982, Table 1.

[99] Whitaker's Almanac (1985), p. 687.

[100] Corpus Almanac and Canadian Sourcebook (1984), vol. 1, p. 5-3.

(1) It is very expensive to apply for enforcement in Northern Ireland, and the whole fee must be paid immediately on the initial application. However it is cheap to issue a writ of execution in Alberta and to file it with the sheriff.[101] Instructing the sheriff to seize and sell will bring more expense, but the Alberta execution creditor need not take that step.[102]

(2) The Northern Ireland system necessarily involves delays at the stage of investigation of the debtor's assets. We are told that some debtors summoned to the Enforcement Office for an examination fail repeatedly to appear. After the examination, the Office must decide which enforcement order to issue which can also add to the delay. In Alberta, the writ or garnishee summons can be issued immediately after judgment, although actual seizure and sale can be a protracted process.

(3) The common law priority system continues to exist in Northern Ireland. A creditor who finds other people ahead of him or her at the Enforcement Office may decide to serve a bankruptcy petition on the debtor[103] or resort to extra-judicial collection methods rather than embark on the enforcement process. In Alberta, the sharing regime imposed by the Execution Creditors Act creates a positive incentive to file a writ of execution but

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[101] Issuing a writ in the clerk's office is included in the initial fee of $25.00 for issuing the statement of claim, except that a writ under the small claims tariff costs $1.00. The fee for filing the writ with the sheriff is $2.00 (Alberta Rules of Court, Schedule E).

[102] The common law notion of dormancy of an unexecuted writ appears inconsistent with the Execution Creditors Act.See Dunlop Book, pp. 370-72.

[103] Solicitors tell us that they advise their clients to follow this course of action.

not to instruct seizure. The creditor thus ensures that he or she will share in the fruits of another person's seizure or garnishment and, in any event, obtain some security against the personalty and, if the writ is filed at the land titles office, the realty of the debtor.

5.41 The Northern Ireland Enforcement Office appears to collect more money on the judgments filed with it than does the Alberta system. A partial explanation of this result is that only those Ulster creditors with claims against solvent debtors will apply at all, and then only when they rank close to the top of the priority list. Creditors pursuing insolvent debtors or who bring up the end of the priority queue are likely to invoke other remedies. If this is true, it is not surprising that the Enforcement Office does better with its self-selected creditors than does the Alberta system which is cheap enough to attract any creditor and which will share any proceeds pari passu.

(3) Other Discussions of the Enforcement Office

5.42 The enforcement office idea has been considered elsewhere. Law reform committees in England and New South Wales have recommended versions of the office, but the respective governments have either refused or failed to act on the proposals. Law reform commissions in Scotland and Ontario have considered and rejected the scheme. It is intended to summarize briefly these reports.

5.43 The best known proposal of an enforcement office is the Pagne Committee Report, published in 1969. The Payne Committee considered the Anderson Committee Report and proposed a similar scheme for England, with one important difference.

5.44 The Northern Ireland report was clear that, once a creditor applied for enforcement, the enforcement office had, with some exceptions, the sole right to decide what enforcement remedies would be used to collect the debt. The Payne Committee split on this issue. Their report, in a singularly ambiguous discussion, seemed to say that creditors should retain control over the type of enforcement process used but that the enforcement office would also have some undefined discretion in the matter.[104] No fewer than six of the twelve committee members signed notes of reservation, all of which supported the more radical Anderson Committee policy.[105]

5.45 The proposals of the Payne Committee were implemented in part,[106] but the enforcement office idea was rejected on grounds of cost and the availability of manpower.[107] Since that time, reform in England has involved primarily a review of the law concerning bankruptcy,[108] and the enforcement office idea has not reappeared as a reform option.

5.46 The New South Wales Law Reform Commission, in a 1975 draft proposal, recommended an enforcement office very close in design to that proposed by the Anderson Committee and legislated in Northern Ireland.[109] No final report was ever produced on the subject, and no legislative action followed.[110] The enforcement office is apparently no longer a matter of active work by the Commission.[111]

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[104] See Payne Committee, paras 373-83, 390-98, 401-06. Cf. Ont. L.R.C. Report, vol. 1, pp. 100-01.

[105] See Payne Committee, pp. 388-91 (Baxter), 391-94 (Bryson), 394-97 (Bryson, Egerton and Morgan), and 399-400 (Sparke and Yandell).

[106] Administration of Justice Act, 1970 (U.K.), c. 31.

[107] Glasser (1971), 34 M.L.R. 61, 67.

[108] See Insolvency Law and Practice: Report of the Review Committee (London, 1982) Cmnd. 8558.

5.47 The Scottish Law Commission[112] and the Ontario Law Reform Commission[113] have considered and rejected the enforcement office idea. Their discussion of the proposal will be reviewed in the following chapter.

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[109] Law Reform Commission of New South Wales, Draft Proposal Relating to the Enforcement of Money Judgments (1975), hereafter N.S.W. Draft Proposal.

[110] Letter from Peter Lemon, Secretary, N.S.W. Law Reform Commission.

[111] Law Reform Commission of New South Wales, Annual Report (1983).

[112] Scot. Memo 47, pp. 30-31, 43-50.

[113] Ont. L.R.C. Report, vol. 1, pp. 109-15.

CHAPTER 6. THE INSTITUTE'S APPROACH TO REFORM

a. Introduction

6.1 In this chapter, we will set out our tentative policy conclusions as to the reform of creditors' remedies law in Alberta. Our recommendations will be summarized in chapter 7.

6.2 This is a report for discussion; our proposals are tentative and not the final views of the Institute. The recommendations are subject to modification in the light of feedback (which is urgently requested). On the basis of the comments and criticisms of the present report, we will issue a final report or reports with detailed proposals and draft legislation.

6.3 We have decided to issue a report for discussion for two reasons:

(1) The area of creditors' remedies has been much discussed by law reform agencies and others in the last twenty years, and major alternatives have been proposed to the law as it exists in jurisdictions like Alberta.[1] These alternative approaches must be delineated and some feedback obtained before we can make detailed recommendations.

(2) Creditors' remedies law affects many people, including all creditors and debtors, most lawyers and many social agencies. It is useful to create plenty of opportunity for their comments before we start to draft new legislation.

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[1] See discussion supra, in c. 5.

b. The Need for a Remedial System

6.4 We start from the belief, shared by almost all writers on the question,[2] that the state should provide a reasonably effective system of collecting debts that are capable of being collected and that are not paid voluntarily. There are no doubt competing values, such as the preservation of those goods necessary to the survival of the debtor and the debtor's family. However the law would render meaningless the creditor's right to repayment if it did not provide a straightforward and adequate system of enforcement.

6.5 We agree with the Payne Committee that people in our society have a moral obligation to pay their debts, which obligation should be reflected in the legal system. The Payne Committee put their position clearly and eloquently, and we adopt their reasoning:

> The implications of our dependence upon credit have posed more questions to moralists and economists than they have been able to answer, and it is no part of our enquiry to examine the ethical and economic aspects of the credit system. We start from the assumption that citizens ought to repay legally binding debts and that the community recognizes a social and moral obligation to honour obligations freely contracted. *Pacta sunt servanda* is not only legal doctrine; it is moral precept too. The function of law is to compel observance of the rule in those marginal cases where moral and social sanctions fail. Accordingly, the legal machinery must be efficient, capable of reaching out to all the assets of a debtor and yet sensitive both to the needs and social circumstances of debtors and to the

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[2] Although see Ison, "Small Claims" (1972), 35 M.L.R. 18; Ison Book, pp. 284-92; Caplovitz Book, pp. 302-04, 139-40. Professor Caplovitz has vacillated on this issue. See the trenchant critique of his position in Cayne and Trebilcock, pp. 428-30.

rights of creditors.[3]

6.6 An effective creditors' remedies system is necessary to maintain our credit economy. Our society wishes to maintain the present credit and economic system and to prevent abuses of that system. The point was made clearly by the Tassé study committee on bankruptcy legislation:

> On the economic level, it is important to preserve public confidence in the credit system of the country. "From the vantage point of borrowers and lenders, an important goal is continuity of credit facilities on reasonable terms for reasonably good risks." Without the means of protecting both debtors from harassment by their creditors and the credit extended by creditors, a loss of public confidence in the system could easily develop.[4]

6.7 It is sometimes said that a substantial number of debtors do not pay because they have legitimate defences to the claim or at least valid complaints about the way that the creditor has treated them.[5] Assuming without deciding that there is a significant number of principled won't pay debtors,[6] they are not in our view a reason for abolishing or substantially weakening the remedial system. Their existence may give support to the kinds of recommendations on debt collection practices made in our Report No. 42, or may even point up the need to improve the pre-judgment process so that defences can be asserted more easily. However the existence in substantial numbers of unasserted defences is not an argument for weakening a creditors' remedies system which must assume that the claims represented by judgments are owing and should be paid.

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[3] Payne Committee, p. 12.

[4] Tassé Committee, pp. 87-88.

[5] See Ison Book, c. 9.

[6] See Parker, pp. 106-10.

6.8 While the vast majority of debts are collected without recourse to the courts, some debtors will neither pay nor will they communicate with their creditors to work out reasonable repayment arrangements. Therefore the creditors, if they do not abandon their claims, must resort either to self-help or to the legal process. Self-help can lead to abuses, some of which are discussed in our Report No. 42 on debt collection practices. The existence of a remedial system will induce many debtors to communicate with their creditors, if only to reveal their lack of income and assets.[7] If these remedies are substantially restricted, they wll cease to be effective, either as collectors of debts or as inducements to debtors and creditors to communicate and to settle their differences.

c. An Integrated and Coherent Remedial System

6.9 In chapter 3, we argued that the present Alberta law of creditors' remedies is a hodge-podge of common law and statutory rules which do not form an integrated system but are confused, messy and incoherent. We noted that the result of this technical confusion was to increase cost and delay for all concerned and to make more difficult the job of the non-lawyers, like sheriffs and their officers, who have to apply the law. When lay people are given no clear guidance by the law, they may either take the route of excessive caution or they may make up their own ad hoc rules to fill gaps in the system.

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[7] See supra, paras. 2.194-2.202. Creditors' remedies are essential to creditor credibility. See Kripke, "Collection Spite, An End to Academic Overreaction, and the Next Curricular Step" (1972), 33 U. Pitts. L.R. 681, 685; but cf. Wallace, "The Logic of Consumer Credit Reform" (1975), 82 Yale L.J. 461, 474-75.

6.10 This technical confusion is thoroughly unsatisfactory. We believe that the law should be completely overhauled and made into an integrated and coherent system which is, so far as possible, comprehensible by the laypeople who must use the law as well as by the legal profession. It will be noted that we are not concerned here with the principles and policies of the system but with the idea that the law should be a system instead of the present jumble.

6.11 We noted in chapter 3 that the Alberta law of creditors' remedies is presently scattered through several statutes as well as the Rules of Court. Our tentative view is that this body of statutory and regulatory law should be brought together into one piece of legislation, which might be called the Enforcement of Money Claims Act. Relevant provisions in the Seizures Act,[8] the Execution Creditors Act,[9] the Exemptions Act[10] and the Land Titles Act[11] could be transferred to this new statute. The relevant provisions in the Alberta Rules of Court, except genuinely procedural sections, would also be moved to the new Act.

6.12 The concentration of all statutory sections into one place would make it easier for lawyers and laypeople to find at least the statutory part of the law of creditors' remedies. More important, the process of drafting the new Act would require the use of consistent terminology and the creation of a coherent and integrated system of rules. The legislative material would be organized in a logical sequence. For example, the draftsperson who set out to rewrite the sections on execution against land would be forced to resolve inconsistencies, fill holes and generally make the rules into a systematic whole. The same benefit would hopefully result throughout the drafting process.

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[8] R.S.A. 1980, c. S-11.

[9] R.S.A. 1980, c. E-14.

[10] R.S.A. 1980, c. E-15.

[11] R.S.A. 1980, c. L-5.

6.13 The movement of most creditors' remedies material from the Alberta Rules of Court to our proposed statute requires a different explanation. At present, much of the substantive law creating creditors' remedies in Alberta is found in the Rules rather than in a statute. The attachment of debts order and the process of attaching assets of an absconding debtor are both entirely created by the Rules,[12] and execution against personalty and land is created and, in part, regulated by the Rules.[13]

6.14 The rule-making power is found in section 18 of the Court of Queen's Bench Act which provides that the Lieutenant Governor in Council may by regulation make rules governing, among other things, "the practice and procedure in the Court."[14] Section 23 of the Act sets up a Rules of Court Committee consisting of three judges, two lawyers and one person appointed by the Attorney General. The responsibility of the Committee is to meet "as occasion requires" to consider the Rules and to make recommendations for their change.

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[12] Rr. 470-84; 485-93.

[13] Rr. 340-83.

[14] Court of Queen's Bench Act, R.S.A. 1980, c. C-29, s. 18(a)(i). See also Court of Appeal Act, R.S.A. 1980, c. C-28, s. 15.

6.15 There is a large body of law concerning the validity of rules of court which go beyond questions of practice and procedure and which affect substantive rights.[15] It is at least arguable that many of the Alberta Rules related to creditors' remedies affect the substantive rights of debtors and creditors by creating remedies which in many jurisdictions are the subject of statutes. In 1974, the Institute issued a report on the validity of the Alberta Rules of Court which recommended that the Judicature Act be amended to validate the existing Rules and to provide authority for their amendment in the future.[16] The legislative response was an amendment to the Judicature Act.[17] The amendment continues in the present Judicature Act as follows:

> 47(1) In this section, "Alberta Rules of Court" means the Alberta Rules of Court, filed as Alberta Regulation 390/68 as amended prior to November 4, 1976.
>
> (2) The Alberta Rules of Court are hereby validated notwithstanding that any provision therein may affect substantive rights.[18]

6.16 If the Institute were to propose extensive changes to the creditors' remedies provisions in the Alberta Rules of Court, it would be necessary to amend section 47 to validate those new rules. Absent such an amendment, any change to the Alberta Rules which went beyond mere procedure would be questionable. Rather than amending provisions presently in the Alberta Rules of Court, we have tentatively concluded that the better solution is to transfer from the Rules to our proposed statute all of the present and proposed rules which affect creditors' remedies unless they are strictly procedural in nature.

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[15] See Dunlop Book, pp. 5-7.

[16] Alberta Institute of Law Research and Reform, Report No. 15: Validity of the Alberta Rules of Court (1974).

[17] Attorney General Statutes Amendment Act, 1976 (No. 2), Alta., c. 58, s. 6.

[18] Judicature Act, R.S.A. 1980, c. J-1.

6.17 The advantages of putting all statutory and regulatory provisions on creditors' remedies in one statute, argued in paragraph 6.12 above, apply with equal force to those provisions which now reside in the Alberta Rules of Court. There is however an additional reason for our proposal. Changes to the Alberta Rules of Court are not subject to the same degree of legislative and public scrutiny as are statutes which are debated in and passed by the Legislative Assembly. This creates no difficulty with purely procedural matters. However the rules relating to garnishment of debts, including wages, prejudgment attachment of assets and execution all raise issues of public interest on which people may well differ. The recent debate over the 1984 amendments to the Exemptions Act[19] illustrate how such issues can generate political controversy. In our view, such issues should be canvassed by the Legislative Assembly rather than by a Rules Committee composed entirely of judges and lawyers, even though there is some public scrutiny of the Committee's proposals.

6.18 It may be said that rules of court, like regulations, are easily amended to meet new developments in business and society. Even if true, this argument of convenience should give way to the right of the Legislative Assembly and the public to consider and decide the policy of our creditor-debtor law. No doubt strictly procedural matters should remain in the Rules, but the substantive law should be put where it belongs, in a statute of Alberta.

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[19] Exemptions Amendment Act, 1984, Alta., c. 51.

6.19 Our tentative conclusion is that the Alberta law regarding the remedies of unsecured creditors should be completely rewritten into an integrated and coherent system of rules which will be, so far as possible, comprehensible by laypeople who must use the law as well as lawyers. To that end, we recommend that the various statutes relevant to unsecured creditors' remedies and the relevant parts of the Alberta Rules of Court should be gathered together into one new statute, which might be called the Enforcement of Money Claims Act. Purely procedural rules should be placed in the Alberta Rules of Court.

d. One Enforcement System for all Courts

6.20 The Payne Committee and the Ontario Law Reform Commission devoted a substantial part of their reports to the problem of the proliferation of different remedial systems attached to different courts. Both reports proposed some simplification of the law.

6.21 Alberta is different in this respect, having only one remedial system attached to the Court of Queen's Bench. The other civil trial court with which we are concerned in this report is the Provincial Court of Alberta hearing small claims matters under Part 4 of the Provincial Court Act.[20] We noted earlier[21] that a money judgment obtained in the latter court can be enforced only through the Court of Queen's Bench. Section 57 of the Provincial Court Act provides that the clerk shall prepare a certificate of each judgment given under Part 4 of the Act ("Small Claims Matters") and shall furnish a copy of the certificate to each party to the action. Section 57(3) provides as follows:

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[20] R.S.A. 1980, c. P-20, ss. 35-73. We say nothing here about (1) enforcement of family law money awards or (2) the enforcement mechanisms available in the Federal Court. As to the latter, see supra, c. 2, note 1.

> (3) The person in whose favour judgment is given may file the certificate of judgment in the Court of Queen's Bench and on being filed
>
> (a) the judgment becomes a judgment of the Court of Queen's Bench, and
>
> (b) execution and garnishee summons may be issued according to the ordinary procedure of the Court of Queen's Bench.

6.22 The effect of section 57(3) would appear to be that the plaintiff in a provincial court action cannot obtain a garnishee summons before judgment. Section 73 of the Act provides:

> 73 If anything necessary for carrying out the objects of this Part is not contained in this Act or the regulations, the remedies, practice and procedure contained in the Alberta Rules of Court may be applied.

One assumes that sections 73 and 57(3) do not permit a provincial court judge to issue a garnishee summons before judgment, although it is remotely possible that he or she can issue an attachment order under Rules 485-93[22] and perhaps other less common pre-judgment remedies.

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[21] Supra, paras. 2.4-2.5.

[22] Of the Alberta Rules of Court.

6.23 From time to time, it is suggested[23] that courts like the Provincial Court should be given their own separate remedial structure, thus bringing them into line with jurisdictions like Ontario.[24] It is argued that the process of getting to judgment in small claims court has been simplified, but that the remedial system remains unnecessarily complicated. At the very least, the creditor enforcing his or her own claim should get more assistance from court officials than is at present available.

6.24 Our tentative conclusion is that, as to judgments obtained under Part 4 ("Small Claims Matters") of the Provincial Court Act, that Court should have no independent enforcement system, but that each judgment should continue to be enforced by the process set out in section 57 of the Act. The creation of a second enforcement system would, in our view, result in a needless duplication of government agencies and would fragment the present structure for no good reason. There is a danger that separate enforcement bodies would develop different and perhaps conflicting practices. The cost of a separate Provincial Court enforcement system is another good reason to retain the present unified enforcement structure.[25]

6.25 However we do recognize that the preent remedial system may be too complicated to be operated without assistance by creditors conducting their own litigation. We seek advice on ways in which the remedial process could be simplified. We are especially interested in how to get advice and assistance to creditors suing without legal counsel.

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[23] See e.g., Spevakow, "Small Claims for Alberta" (1979), 17 Alta. L. Rev. 244, 257; Manitoba L.R.C. Report, The Structure of the Courts; Part II: The Adjudication of Smaller Claims (1983), pp. 43-44.

[24] See Ontario Courts of Justice Act, S.O. 1984, c. 11; Provincial Court (Civil Division) Rules (1985).

[25] Cf. Ont. L.R.C. Report, vol. 1, pp. 77-83, 124-25.

6.26 The above proposals leave open the question of pre-judgment remedies in the Provincial Court, described in paragraph 6.22. Our tentative view is that a plaintiff in a Provincial Court action should not be able to obtain remedial relief before judgment. Pre-judgment remedies are potentially abusive and dangerous, and should be granted only in special cases. Their use should, in our opinion, be restricted to plaintiffs suing in the Court of Queen's Bench.[26]

e. Imprisonment an Inappropriate Remedy

6.27 The history of English and Canadian creditors' remedies law is, in large part, a movement away from imprisonment of the debtor towards remedies against the debtor's property. In chapter 2,[27] we came to the general conclusion that imprisonment for debt, whether based on statute or on the common law, has been abolished in Alberta, at least as a remedy for trade creditors. We noted four exceptional situations where imprisonment can occur in the enforcement of a money judgment.

6.28 In our view, the present policy prohibiting imprisonment for debt as a remedy to enforce money judgments is sound and should be continued. Imprisonment is a punitive, criminal sanction which is not appropriate for commercial disputes, particularly when many debtors fail to pay because they are unable to do so.[28] The debtor is unlikely to be able to earn money while in jail, and the battle over imprisonment, futile in most cases, will not encourage the debtor to seek a reasonable accommodation with his creditors. Even if the creditor is to pay for the debtor's upkeep while in prison, the cost of imprisonment to the society will far outweigh any social benefit to be gained.

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[26] On pre-judgment remedies generally, see below, paras. 6.62-6.71.

[27] Paras. 2.159-2.161.

6.29 As to the four exceptional cases where imprisonment may occur in Alberta, we will not discuss imprisonment of maintenance defaulters at all in this report. The second and third exceptions (examination in aid and absconding debtors) will be discussed later.[29] However the fourth exception, based on the Nova Scotia decision in MacNeil v. MacNeil,[30] is relevant to the present discussion.

6.30 In the MacNeil case, the Nova Scotia Court of Appeal concluded that a judgment debtor should be imprisoned where he not only refused to pay the debt but also actively concealed his assets with a view to frustrate the judgment creditor.[31] We find the result troublesome in its narrow interpretation of the rule abolishing imprisonment for failure to pay a money judgment. However it is difficult to decide whether legislation to prevent this aspect of the MacNeil case being followed in Alberta is (i) necessary or (ii) possible without excessively subtle drafting. It may be a matter to be left to the judges. We invite comment.

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[28] Supra, para. 4.51.

[29] Infra, paras. 6.156 (examination in aid), 6.70-6.71 (absconding debtors).

[30] (1975), 25 R.F.L. 357 (N.S.C.A.).

[31] Supra, para. 2.161.

f. Assets and Income Available to Enforcement

6.31 At present, there are assets of the debtor which cannot be seized or attached by an unsecured creditor, or which are difficult or impossible for the sheriff to sell or otherwise realize upon. Examples discussed in chapter 2 are shares in non-distributing corporations,[32] R.R.S.Ps.,[33] the interest of purchasers under agreements for sale of land,[34] some term deposits[35] and joint bank accounts.[36] Some, if not all, of these assets escape the creditor's grasp because of the inadequacies of the present remedies rather than because of a considered policy.

6.32 Our tentative view is that all assets and income of the debtor should be exigible or attachable by his or her unsecured creditors, unless there is some good reason for coming to a different result. This position is a necessary result of our view, expressed earlier, that the state should provide a reasonably effective system of collecting unpaid debts that are capable of being collected.[37] Any defects in the sheriff's or the creditor's power to realize on such assets should be corrected, again unless there is a countervailing policy.[38] The movement from execution against the person of the debtor to execution against the debtor's property still needs to be completed in this jurisdiction.[39]

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[32] Supra, paras. 2.86-2.89.

[33] Loc. cit.

[34] Supra, para. 2.106.

[35] Supra, para. 2.133.

[36] Supra, para. 2.134.

[37] Supra, para. 6.4.

[38] See infra, paras. 6.181-6.187.

6.33 The most obvious reason why assets or income should not be exigible or attachable is that they are necessary to the survival of the debtor, and to his or her continued ability to work. In 1978, the Institute published a working paper entitled Exemptions from Execution and Wage Garnishment. We received some useful comment on that paper immediately after its publication, but we would appreciate more feedback on the present law of exemptions before we make our final recommendations.

6.34 There may be other countervailing values which should lead us to exempt assets from execution or attachment. In general, property of a third person should not be exigible, but should this principle prevent a creditor seizing or attaching household goods (the ownership of which may be uncertain[40]) or joint bank accounts? Bank accounts are frequently subject to conditions as to withdrawal of the money. Should the creditor be able to ignore some or all of those conditions?[41] Folding an

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[39] Cf. Payne Committee, pp. 87-89; Dore and Kerr, pp. 258-75; Ont. L.R.C. Report, vol. 2, pp. 25-31; vol. 3, pp. 5-14.

[40] The Judgments Enforcement (N.I.) Order 1981 [SI 1981/226 (N.I. 6)] hereafter Order 6, provides in s. 32(d) that an order of seizure authorizes the seizure of:

> goods of the debtor's spouse, where it appears to the Office that the judgment debt relates to-
> (i) goods obtained or services rendered; or
> (ii) the rent of, or rates due in respect of the occupation of, premises;
> for the general use or enjoyment of the debtor, his spouse and his dependants residing with him.

[41] Order 6, s. 72, provides:

> 72.--(1) Subject to paragraph (2), a sum standing to the credit of a person in a deposit account in a bank shall, for the purposes of Article 69, be deemed to be a sum due or accruing to that person and shall be attachable notwithstanding that any of the following

R.R.S.P. and withdrawing the money may have serious tax consequences for the debtor-planholder. Should the creditor (or the sheriff on his behalf) be free to collapse the plan despite the harm which may be done to the creditor? The Institute invites comment on what exceptions should exist to the general rule that all assets owned by the debtor should be available to execution or attachment.

g. Creditor Control of the Enforcement Process

6.35 At present, the unsecured creditor exerts some control over the process of enforcement of his or her money claim. The creditor decides whether to press the claim to judgment, whether to launch prejudgment or postjudgment remedies, and which and how many remedies to pursue. In our empirical study, we found files in which creditors had issued a writ of execution, instructed seizure and had also issued several garnishee summonses against

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[41](cont'd) conditions has not been satisfied-

- (a) any condition requiring notice before any money is withdrawn:
- (b) any condition that a personal application must be made before any money is withdrawn;
- (c) any condition that a deposit book must be produced before any money is withdrawn;
- (d) any such other condition as may be prescribed by rules.

(2) Paragraph (1) shall not apply to any account in--

- (a) the National Savings Bank; or
- (b) any trustee savings bank; or
- (c) any bank having two or more places of business in Northern Ireland if the terms applicable to the account permit withdrawals on demand (whether with or without restrictions as to the amount which may be withdrawn) on production of a deposit book at more than one of their places of business.

Cf. cases cited supra, c. 2, note 199.

employers and banks thought to be indebted to the debtor.

6.36 The activities of the creditor are not completely unfettered. Certain assets and debts are exempt from execution or attachment. The judgment debtor whose goods are seized can sign a notice of objection, forcing the creditor to apply to a judge for a removal and sale order. Whatever the legal rules, the effectiveness of a creditor's enforcement endeavours depends on the cooperation of the bailiffs (in the case of execution) and the garnishee, whether an employer or a bank. Finally the enforcement process costs money and takes time, factors which put limits on the zeal of all but the most spiteful of creditors.

6.37 One should not assume that all creditors who start on the enforcement trail press their claims to the bitter end. In our empirical report, we observed that the creditors' remedies system resembled a funnel or a series of filters.

> A large number of statements of claims are filed, fewer judgments are obtained, still fewer writs of execution are issued and so on down to the comparative handful of creditors who actually press on to seizure and sale. Some creditors drop out of the process because they have been paid. Others, who have perhaps learned more about the debtor since issuing their statements of claim, give up any further attempt to collect the judgment.[42]

6.38 At present, Alberta law does not have a formal device intended to separate the can't pay from the won't pay debtors.[43] The law leaves this screening process to the parties. What the funnel shape of creditors' remedies use suggests is that some sort of informal screening does take place in a significant number of cases.

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[42] Dunlop Report, para. 3.6.

[43] An exception, although probably not intended for this purpose, is the removal and sale application.

6.39 From the start of the relationship, the creditor is collecting and updating information about the debtor. A credit check may be made at the time of the original contract, and the creditor is likely to do more investigation during the debt collection process and before legal action is commenced. Further information will be obtained from the bailiff or the garnisheed employer. Sometimes the debtor will contact the creditor directly.

6.40 By these various methods, the creditor learns a substantial amount about the employment and assets of his debtor. This information may induce the creditor to drop the lawsuit or to carry on. At the same time, the debtor is being educated about the seriousness of the situation and the firmness of the creditor's intention to collect. The result may be that the debtor will pay in full, or the parties will strike a compromise, perhaps including a repayment schedule. The point is that the parties, without judicial or administrative intervention, are making decisions about repayment of debts or the abandonment of lawsuits, based on some knowledge of the debtor's means. In hopeless cases, creditors are terminating further action; in other situations, debtors are coming forward to make repayment arrangements.[44] Some such course of conduct is a reasonable interpretation of the funnel shape of creditors' remedies established by our empirical study.

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[44] See also the substantial number of satisfaction pieces filed in the clerks' or the sheriffs' offices. See Dunlop Report, c. 10.

6.41 In chapter 5, we reviewed several critics of remedial systems like that presently in force in Alberta. One object of their criticism is the extent to which the creditor controls the enforcement process. In this section, we will consider their analysis of the present system and their reform ideas, all of which in some way seek to diminish creditor control.

6.42 Building on the relationship between debt and poverty, the critics find the law to be fundamentally unfair in its attempt to extract money from people who, by and large, are unable rather than unwilling to pay.[45] They note that the creditors have greater knowledge, experience and power than the debtors and are better able to manipulate the remedial system[46] which in any event caters to their needs rather than acting as a neutral arbiter between creditor and debtor.

6.43 It is argued that the present remedial system often exacerbates the breakdown of communication between debtor and creditor which leads to unnecessarily protracted and fruitless litigation.[47] The legal system makes little or no effort to discriminate between debtors who cannot pay and debtors who have resources but who refuse to pay, either because of a perceived defence or for some other reason. Creditors often exercise poor judgment and pursue too many hopeless cases because of lack of information and bureaucratic rigidity. Debtors, because of ignorance and fear, fail to seek help or to invoke the protection of the Bankruptcy Act. More significantly, an unfair and coercive enforcement system enables creditors to extract payments or compromise agreements from debtors which are unrealistic in light of the debtors' financial situation.

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[45] Supra, paras. 4.8-4.43, 4.50-4.51.

[46] Supra, paras. 4.44-4.49.

[47] Supra, paras. 2.203-2.207.

6.44 In chapter 5,[48] we noted five major reform ideas, three of which are relevant to the present discussion. They are:

(1) compulsory mediation or arbitration of debt disputes,

(2) state screening of debtors, and

(3) limitation or abolition of creditor control.

While proposal (3) speaks directly to the issue, the other two ideas, except compulsory mediation, necessarily imply a lessening of the creditor's present right to control whether and how a debt is collected. Of the four schemes discussed in chapter 5, compulsory arbitration, the judgment hearing and the enforcement office involve a substantial reduction of creditor control, although compulsory mediation would appear simply to add a step to the collection process, leaving it otherwise unchanged.

6.45 When we evaluate these criticisms of the present enforcement system, some points can be disposed of fairly easily. The funnel shape of the statistics on use of remedies indicates that creditors must be making decisions to stop enforcement at various stages. We can conclude that an informal screening mechanism now exists whereby creditors acquire information about debtors on the basis of which they decide to abandon their actions, to enforce their judgments or to seek some form of compromise. Creditors are forced by the expense of debt collection to make an effort to discriminate between can't pays and won't pays.

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[48] Para. 5.9.

6.46 Hard-pressed debtors have a variety of alternatives. They are free to assign into bankruptcy[49] or to seek the protection of the Orderly Payment of Debts sections of the Bankruptcy Act.[50] They can seek the advice of the Alberta Family Financial Counselling Service. Another alternative is to contact the creditor directly, explain the situation and work out a repayment schedule.

6.47 There is therefore in place an informal screening system which is effective to some extent in distinguishing genuine hardship cases from situations where the debtor can pay but refuses to do so. It is however true that, except for the removal and sale application[51] and the de facto screening by bailiffs in the course of execution, there is no formal mechanism to classify debtors and to differentiate enforcement tactics according to that classification. There is also no guarantee that compromises reached between creditor and debtor in order to stop further collection efforts may not be unfair to the debtor.

6.48 There are other criticisms of the present creditors' remedies system which raise more difficult problems. There can be no doubt that the poor are more vulnerable to debt problems than are the rest of society. All the studies we have examined show that the majority of people who end up in serious debt trouble such as wage garnishment or an application under Part X are unable to pay their debts, whether they want to or not. It is also a fair criticism of our creditors' remedies law that it favours those litigants with knowledge, experience and money: in most cases, the creditors.

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[49] Bankruptcy Act, R.S.C. 1970, c. B-3, s. 31.

[50] Supra, note 49, Part X. The options of the debtor would be greater if the Bankruptcy Bill, 1984 (Can.), Bill C-17 were passed.

[51] Seizures Act, R.S.A. 1980, c. S-11, ss. 26-30.

6.49 One might develop a partial answer to these criticisms of unfairness by noting the existence of exemptions laws, the removal and sale process, the Family Financial Counselling Service and the Bankruptcy Act, including Part X. Assuming however that there is substance to the critical analysis, the question is how to change the law to make it as fair as possible to debtors and creditors alike.

6.50 The proposals reviewed in chapter 5 see the solution to the problem of unfairness in the substitution of the state for the creditor as the principal controller of the debt collection process. For the state to exercise this function, it is necessary that every judgment debtor be examined by a judicial or administrative officer regarding assets before the state can decide whether a judgment should be enforced and, if so, by what means.

6.51 The issue for us is whether the enforcement of money claims and judgments should continue to be controlled by the creditor within the limits imposed by the law, or whether this is properly a function for a judicial or administrative officer of the state. Our tentative view is that creditor control should continue to be the rule, and that the schemes discussed in chapter 5 should be rejected.[52] Our reasons follow.

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[52] We leave aside for the moment the possibility of some form

6.52 The first general point has to do with the inescapable problem of cost. In an ideal world with infinite resources available to government, we might be tempted to recommend elaborate, individualized, formal screening mechanisms in the creditor-debtor post-judgment system. We might for example urge the government to institute formal mediation in every debt case, followed by required post-judgment hearings to determine the appropriate remedy, the proper level of exemptions and so on.

6.53 It is obvious that we do not live in an ideal world. Individualized hearings and decisions are very expensive to the state and therefore to the taxpayers. Debt actions are numerous and small in dollar terms. It is reasonable to assume that the parties cannot afford to run them like major litigation, with the result that the individualization of justice in the debtor-creditor area will have to be accomplished largely by the expenditure of more tax dollars on mediators, judges, support personnel and the attendent overhead expenses. If we were to propose a substantially more expensive debt collection process, the cost to be borne by the creditors, the predictable consequences would be either the restriction of credit to marginal risks[53] or the resort by creditors to more harassing debt collection practices[54] or both.[55] The conclusion that we draw is

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[52](cont'd) of compulsory questionnaire to the debtor as part of a creditor-dominated system.

[53] Cayne and Trebilcock, passim.

[54] Cf. Anderson, "Coercive Collection and Exempt Property in Texas: A Debtor's Paradise or a Living Hell?" (1975), 13 Houston L.R. 84 (hereafter Anderson).

[55] In Northern Ireland, the entire cost is based on a flat rate which is substantial and is paid on the application for enforcement, whatever the ultimate result. Supra, para. 5.34(2).

that any proposal which would increase substantially the cost or the complexity of the creditors' remedies process must be subjected to careful scrutiny in which the costs, economic and otherwise, are weighed against the evil sought to be controlled.

6.54 The cost of schemes like the Enforcement Office is increased if the state must examine every debtor concerning whom an application for enforcement is made, and must then decide what is the appropriate remedy, if any. Translated into Alberta terms, this would require an examination to be conducted for every debtor against whom a writ of execution is filed in a sheriff's office.[56] However, as our empirical study shows,[57] most creditors who issue writs go no further. In other words, the cost of the chapter 5 proposals is greater because the examination takes place at the wide end of the funnel.[58] The cost would be even greater in a jurisdiction like Alberta which is much larger in area and much more thinly populated than Northern Ireland.[59]

6.55 The same difficulty flaws all of the proposals considered in chapter 5. For example, it is hard to see how the law can force all debtors and creditors to participate in a mediation exercise without considerable economic cost. Even if Ramsay's suggested thirty minute mediation session[60] is too long, the compulsory requirement of mediation would necessitate the hiring of substantial numbers of Leff's impartial referees, not to speak of the "conversation pits" in which they are to function. The same can be said of the Adler-McCreadie arbitrators or the Australian Law Reform Commission judicial officers.

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[56] In Northern Ireland, an enforcement officer attends at the debtor's home to examine him, or the debtor is summoned to the Office in Belfast for an examination under oath. The Office does not use a written questionnaire mailed to the debtor, probably because it is thought that debtors would not complete and return them.

[57] Supra, para. 6.37.

[58] The point is made by the Scottish Law Commission in its criticism of the Enforcement Office system. See Scot. Memo 47, p. 48.

[59] The enforcement office idea was rejected in England because of cost. See supra, para. 5.45.

6.56 Another major practical difficulty with all of the schemes discussed in chapter 5 is that they appear bound to delay the collection of the debt. The compulsory mediation exercise is not proposed as an alternative to coercive collection but as a preliminary to it, although the hope is that mediation will remove the need for coercive collection in many cases. Our fear is however that the additional mediation step will often have the effect of delaying (without resolving) the court proceedings, perhaps for substantial periods of time. One of the principal criticisms by creditors and solicitors of the Enforcement Office is the lengthy and sometimes inexplicable delay in completing the process. In part this delay flows from financial constraints but, given adequate resources, delay seems inevitable in a system which requires that all debtors be examined as to their resources before enforcement can take place.

6.57 To this point, we have defended the present system of creditor control as against the idea of state supervision on the essentially negative grounds of cost and delay. We can however go further and suggest that it is sensible to leave to the creditor the responsibility to initiate and to carry on the debt collection process. It is the creditor who wants to realize on the judgment and who will benefit from doing so. Let the creditor take the necessary steps to put the legal machinery in motion, to choose the appropriate remedy and to pay the costs on a step by step basis. It may well be that there should be limits to the use of the judicial collection machinery but the initiative should in our view remain with the creditor to invoke such remedies as appear useful to collect the debt.[61]

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[60] Supra, para. 5.13(4).

6.58 There is a tendency in some of the chapter 5 proposals to see the enforcement of judgments process as an opportunity to diagnose the debtor's problems and to force on him or her much helpful advice. The word "force" is not too strong; the schemes under consideration all involve a substantial degree of compulsion on the debtor to appear to be examined, mediated or arbitrated. There is a distastefully paternalistic quality about these proposals. Debtors and to some extent creditors are assumed to be inadequate to figure out their own problems and to reach sensible solutions. We have no doubt that debtor education and assistance is a matter of great importance, but we think it wrong to mix that activity together with the very different but equally important goal of enforcing judgments, to the detriment of both.

6.59 One criticism advanced against the present system is that debtors who negotiate compromises or repayment agreements privately with their creditors are likely, because of their naivety and ignorance, to be overreached and to make bad bargains. Assuming that this problem exists, it is not obvious why adoption of a state-supervised enforcement system would change matters. It is no doubt true that the mediator, arbitrator or judge will counsel the debtor as to an appropriate repayment rate, if the lawsuit gets that far. But there is clearly a strong incentive on the creditor to make a repayment deal with the debtor before the matter gets before the state officer.

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[61] Cf. Ont. L.R.C. Report, vol. 1, pp. 109-15. The Ontario Commission rejected the enforcement office idea in part because such a highly individualized system of justice is excessively unpredictable and ambiguous.

6.60 There are a number of other points which can be made about the reform proposals considered in chapter 5. It is in general unwise for a province like Alberta to adopt a body of commercial law radically different from the law of the rest of the country, unless there is a very good reason for doing so.[62] There are technical problems with each of the chapter 5 proposals which might be examined at length.[63] Statistics suggesting a better success rate for the Northern Ireland Office need to be examined carefully in light of the relatively small case load carried by the Office.[64]

6.61 The upshot of the above discussion is that we tentatively recommend that Alberta retain the principle of creditor control of the enforcement of money claims and judgments. We think that the creditor should continue to initiate and pursue recovery remedies, and should choose which remedies to pursue. The cost, delay and paternalism inherent in state-controlled enforcement schemes like those discussed in chapter 5 lead us to reject them for this jurisdiction.[65] State enforcement schemes are much more appropriate in the narrow context of maintenance defaulters,[66] but they should not be used for the enforcement of claims and judgments generally. We will later want to consider what limits and controls now exist on the creditor's discretion, and whether they are adequate.

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[62] Cf. Dore and Kerr, 236-37. See also the warning by Cayne and Trebilcock, supra, para. 4.59, that radical legal changes to consumer and creditor-debtor law may actually worsen the plight of the poor.

[63] For example, the compulsory mediation model raises questions of the mediator's neutrality, the nature of the mediation session itself (e.g., is there a duty to bargain in good faith?), and the relationship between a failed mediation and the subsequent trial.

[64] See supra, paras. 5.36-5.41. The same point is made by the Scottish Law Commission. See Scot. Memo 47, p. 49.

h. A Pre-Judgment Remedy

6.62 In chapter 2,[67] we discussed the remedies which are available to a creditor-plaintiff against the debtor's property before the creditor has obtained judgment against the defendant. The objective of these pre-judgment remedies is to attach property of the defendant in order to ensure that it will be available once the plaintiff obtains judgment. Most of these processes are based on long-established, narrowly-drafted legislation, but the recent judicial invention of the Mareva injunction[68] has added a powerful weapon to the creditor's arsenal.

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[65] We will return to those studies later in this chapter for assistance on specific aspects of our system.

[66] The plaintiff spouse, unlike most trade creditors, needs prompt and consistent payment of maintenance to survive. The state is also interested because many spouses who do not receive their maintenance will be forced onto welfare, with the public discharging the delinquent spouse's obligations.

[67] Paras. 2.14-2.35.

[68] Supra, paras. 2.30-2.35.

6.63 It has long been appreciated that pre-judgment remedies are potentially dangerous because they enable an unscrupulous plaintiff to exert considerable pressure on a defendant to settle rather than defend.[69] As a result, the courts in pre-judgment garnishment cases have insisted that the applicant adhere strictly and precisely to the requirements of the Rules,[70] and a similarly high procedural standard may be emerging in Canadian *Mareva* injunction cases.[71] In the United States, judicial hostility to pre-judgment remedies has expressed itself in a series of decisions striking down some processes as violating the constitutional guarantee against deprivation of property without due process.[72]

6.64 While the Institute recognizes the dangers inherent in any pre-judgment remedy, we think that there are cases where such an extraordinary process is justified. The basic principle is that a creditor should have a reasonably effective means of collecting debts, and that a debtor should not be allowed to defeat collection by the simple expedient of moving assets outside the jurisdiction or disposing of them within the jurisdiction but outside the normal course of business. There may be clear evidence that the debtor is about to withdraw assets from the jurisdiction or to dissipate them within the jurisdiction so that nothing is likely to remain when the plaintiff obtains judgment against the defendant. We therefore tentatively propose that a plaintiff who is claiming some sort of monetary judgment[73] should, before judgment is obtained, be able in narrowly defined situations to attach property of the defendant in order to ensure that it will be available for execution or attachment once the plaintiff obtains judgment.

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[69] See e.g., *Knowles* v. *Peter* (1954), 12 W.W.R. 560 (B.C.S.C.); Whitford, pp. 1086-96.

[70] *Supra*, para. 2.18.

[71] *Chitel* v. *Rothbart* (1982), 30 C.P.C. 205 (Ont. C.A.).

[72] *Sniadach* v. *Family Finance Corp*. (1969), 395 U.S. 337; *Fuentes* v. *Shevin* (1972), 407 U.S. 67; *Mitchell* v. *W.T. Grant Co*. (1974), 94 S. Ct. 1895; *North Georgia Finishing Inc*. v. *Di-Chem Inc*. (1975), 95 S. Ct. 719; *Flagg Bros. Inc*. v. *Brooks* (1978), 436 U.S. 149; Hatchett, "The Three Stages of Hernandez" (1978-79), 28 DePaul L.R. 901. Analogous arguments may be available under the Canadian Charter of Rights and Freedoms. See *R*. v. *Fisherman's Wharf Ltd*. (1982), 135 D.L.R. (3d) 307 (N.B.Q.B.). The appeal was denied by the N.B.C.A. on non-Charter grounds, at 44 N.B.R. (2d) 201 (sub nom. *Re Estabrooks Pontiac Buick Ltd*.; *N.B.* v. *Estabrooks Pontiac Buick Ltd*.; *Re Fisherman's Wharf Ltd*.; *N.B.* v. *Fisherman's Wharf Ltd*.).

6.65 The next issue is whether the present pre-judgment remedies are in need of reform. We think that the answer is yes. Several of the existing remedies, especially the rules on attachment of assets, are based on antiquated statutory models which should for that reason alone be reviewed.

6.66 More fundamental are the changes in society and technology which necessitate a new look at pre-judgment processes. The Ontario Law Reform Commission noted the increasing ease of national and international travel as well as the creation of instant intercontinental telecommunications as necessitating more sophisticated methods to defeat the absconding debtor.[74] The Commission quoted Lawton L.J. from one of the leading Mareva injunction cases on the effect of technological changes:

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[73] We are not concerned here with plaintiffs who claim some property interest and then seek a pre-judgment remedy such as replevin against the property claimed. However the remedy might be available in a damage action as well as a debt action because both claims can result in a money judgment. See infra, para. 6.69(1).

[74] Ont. L.R.C. Report, vol. 4, pp. 54-55.

> Nowadays defaulting on debts has been made easier for the foreign debtor by the use of corporations, many of which hide the identities of those who control them, and of so-called flags of convenience, together with the development of world-wide banking and swift communications. By a few words spoken into a radio telephone or tapped out on a telex machine bank balances can be transferred from one country to another and within seconds can come to rest in a bank which is untraceable or, even if known, such balances cannot be reached by any effective legal process.
>
> . . . .
>
> Once a writ is issued, a debtor who intends to default will do what he can to avoid having to meet his obligations. The British defaulter may try to dissipate his assets; he may succeed to some extent but retribution in the form of either bankruptcy or liquidation will probably come about one day. Until recently the prospects for the defaulting foreigner were much better. A telephone call or telex message could within seconds of the service of a writ, or knowledge that a writ had been issued, put all liquid assets out of the reach of the creditor.[75]

The English courts responded to these changes by creating the Mareva injunction. They are also a good reason for this Institute to examine pre-judgment remedies.

6.67 Reform is complicated by the existence of several pre-judgment remedies, each with different rules and preconditions. In chapter 2,[76] we noted the existence in Alberta law today of attachment of debts, attachment of assets, receivership orders, including Rule 465 on auction sales, and the Mareva injunction. These processes are available for different causes of action against different kinds of assets, and the guidelines and procedures vary from remedy to remedy. As for the Mareva injunction, the recent explosion of cases on that process has left its scope and nature in considerable doubt.

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[75] Third Chandris Shipping Corp. v. Unimarine S.A., [1979] 2 All E.R. 972, 986 (C.A.).

[76] Paras. 2.14-2.35.

6.68 A possible reform is that the present remedies available before judgment to a plaintiff claiming monetary relief should be replaced by one new pre-judgment remedy. The result would be that attachment of debts, attachment of assets and receivership orders obtained before judgment, and perhaps the Mareva injunction, would disappear, and that a new pre-judgment process would be substituted. We invite comment.

6.69 It is not intended in this paper to make detailed recommendations as to the rules which should govern pre-judgment remedies. However we do wish to list some issues which will have to be answered in our final report, with our first thoughts on some of these matters. Here, as elsewhere, we request comment.[77]

(1) Cause of action. At present, attachment of debts and attachment of assets before judgment are available only where the plaintiff's cause of action is one of debt (and "liquidated demand" in the case of attachment of debts).[78] On the other hand, the Mareva injunction has been held to be available

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[77] For a detailed outline of a provisional relief process, see Ont. L.R.C. Report, vol. 4, pp. 1-124. Two other possible models, discussed by the Ontario Commission, are the attachment provisions in the Nova Scotia and Prince Edward Island Rules of Court, and the attachment statutes passed in various American states after the Sniadach line of cases. See Ont. L.R.C. Report, vol. 4, pp. 56-68. See also Payne Committee, pp. 146-47.

[78] Supra, paras. 2.17, 2.22.

whatever the plaintiff's cause of action.[79] We invite comment on which rule is preferable or whether some other test is appropriate.

(2) Need the action have commenced? The preceding paragraph assumes, as is the present rule in attachment of debts and assets,[80] that the plaintiff must have commenced an action before applying for pre-judgment relief. However the courts in England are clear that a Mareva injunction can be sought and obtained before the commencement of the plaintiff's action.[81] There may be situations where the remedy should be available before the action is commenced, in which case the statute should clearly so state.

(3) Judge's order. Because of the potential harm which can result from pre-judgment remedies, we think that they should not be available except on application to a judge.[82]

(4) Assets subject to the remedy. Our tentative view is that the remedy or remedies should be capable of attaching at the discretion of the court all assets of the defendant except those which are exempt from any post-judgment remedy.[83] The problem of attachment of wages or salary before judgment requires further comment. In our 1978 working paper on exemptions,[84] we observed

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[79] Chitel v. Rothbart, supra, note 71, at p. 228.

[80] Supra, paras. 2.16, 2.22.

[81] See Dunlop Supplement, p. 65. The Canadian cases have not clearly settled the question. Loc. cit.

[82] Ont. L.R.C. Report, vol. 4, p. 102.

[83] On exemptions, see Ont. L.R.C. Report, vol. 4, pp. 90-92.

[84] At pp. 51-52.

that Alberta, unlike some other Canadian jurisdictions, permits pre-judgment wage garnishment. We then said the following:

> The disadvantages of pre-judgment wage garnishment are:
>
> (a) The debtor has no opportunity to state his case until after the garnishment has been made. Such a procedure seems contrary to notions of natural justice, due process, and equity. It may result in a debtor being garnisheed notwithstanding that he has a good defence to the action.
>
> (b) It can be used as a powerful lever by the creditor to force the debtor into an inequitable repayment scheme. It may also precipitate some of the calamities mentioned in relation to the use of the threat of post-judgment wage garnishment.
>
> (c) A debtor may not understand the difference between a pre-judgment and post-judgment garnishment order. He may therefore assume that the action has already gone against him and not take any further action to defend the claim.
>
> We therefore invite comment on the desirability of retaining or abolishing pre-judgment wage garnishment.[85]

The invitation for comments on this issue is still open.

(5) Grounds for the remedy. Attachment of debts is available before judgment where the plaintiff can establish "a reasonable possibility that the plaintiff will be unable to collect all or part of his claim or be subjected to unreasonable delay in the collection thereof unless permitted to issue a garnishee summons."[86] The grounds for issue of a *Mareva*

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[85] Exemptions Working Paper, p. 52.

[86] Alberta Rules of Court, r. 470(1)(d). Cf. the grounds for issue of a writ of attachment in r. 485, set out above at para. 2.22.

injunction have been much debated in the cases. One relatively conservative formulation is the following, drawn from the decision of the Ontario Court of Appeal in Chitel v. Rothbart:

> The applicant must persuade the Court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law.[87]

There are important questions here as to the grounds for issue of pre-judgment relief, and the standard of proof required of the plaintiff.[88] On both matters, the Institute has no present view and seeks feedback.

(6) Procedure. Bearing in mind the urgent nature of applications for pre-judgment relief, it seems inevitable that the plaintiff should be able to apply *ex parte* but with leave to the defendant to apply to have the order rescinded or varied.[89] The *Mareva* cases impose on applicants a duty of full and frank disclosure as well as a requirement to give an undertaking to compensate the defendant if the claim or the injunction turns out to be unjustified.[90] Some such requirement could be built into the proposed statute.

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[87] Chitel v. Rothbart, *supra*, note 71, at p. 229.

[88] See Ont. L.R.C. Report, vol. 4, pp. 75-82, 99-102.

[89] Ont. L.R.C. Report, vol. 4, pp. 102-04. On due process in creditors' remedies, see also Dore and Kerr, pp. 222-29, 275-325, commented on in Ont. L.R.C. Report, vol. 1, pp. 111-12, vol. 4, pp. 61-68.

[90] Dunlop Supplement, pp. 71-72.

(7) The form and effect of a pre-judgment order. Some thought must be given to the form and effect of pre-judgment remedies, once they are issued. An attachment of debts order issued before judgment is an order to the garnishee to pay the debt forthwith into court.[91] A writ of attachment similarly operates as an instruction to the sheriff to seize immediately, without waiting for the plaintiff to go to judgment.[92] The Mareva injunction, on the other hand, operates as an instruction to the defendant or to a third person, such as a bank, to retain and not to dispose of the defendant's property. The Ontario Law Reform Commission thought that the court granting the remedy should be free to order any method of attachment which it considered just and equitable, including seizure, registration of the order under the Personal Property Security Act or injunction.[93] We invite comment on the question of the proper form and effect of the pre-judgment remedy or remedies.[94]

6.70 To this point, we have talked only of a pre-judgment remedy against the debtor's property. However, in chapter 2,[95] we noted that there may still exist in Alberta law the equitable writ of ne exeat regno which orders a debtor not to leave the jurisdiction on pain of imprisonment[96] and which became part of Canadian law under the label of ne exeat provincia.[97] The remedy was developed by the courts of equity as a pre-judgment process analogous to capias ad respondendum which was available at common law. The common law remedy was clearly abolished by the Imperial Debtors Act, 1869,[98] and the anti-imprisonment philosophy was confirmed by Alberta legislation passed early in this century,[99] but the equitable remedy may survive.

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[91] R. 475 of the Alberta Rules of Court makes no distinction between garnishment before and after judgment; but cf. B.C. Millwork Products Ltd. v. Overhead Door Sales Ltd. (1961), 34 W.W.R. 86 (B.C.S.C.).

[92] Alberta Rules of Court, rr. 485, 489-490.

[93] Ont. L.R.C. Report, vol. 4, p. 96; cf. Whitford, pp. 1125-26. The Ontario Commission would give the court power to sell or dispose of attached goods where there is just cause. Ibid., pp. 110-12. One assumes that such a power would be an exception to the usual rule that the purpose of pre-judgment remedies is to hold the defendant's property intact until judgment is obtained at which point the frozen asset may be attached pursuant to a post-judgment process.

[94] The statute should also say whether an attachment order gives any proprietary interest in the goods attached or whether it simply operates in personam against the defendant and third parties notified of the order.

6.71 The clear policy of Alberta law is to abolish imprisonment for debt, particularly prior to judgment being obtained.[100] Other Canadian jurisdictions have either repealed or sharply restricted their statutes permitting imprisonment of absconding defendants before judgment.[101] In our view, there is no good reason to permit the writ of ne exeat regno to continue. We therefore tentatively recommend that the law should be amended to make it clear that the writs of ne exeat regno and ne exeat provincia are abolished as processes available to plaintiffs in actions claiming monetary relief.[102]

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[95] Para. 2.161(3).

[96] Felton v. Callis, [1968] 3 All E.R. 673. See also Chisholm, "Does 13th-century writ provide new debtor arrest remedy?" (1986), 5 Ont. Lawyers Weekly, No. 42, p. 1.

[97] Dunlop Book, p. 99.

[98] 32 and 33 Vict., c. 62.

[99] Supra , para. 2.160.

[100] Supra, paras. 2.160, 6.27-6.30.

[101] Dunlop Book, pp. 101-04; Ont. L.R.C. Report, vol. 4, pp. 51-56, 72-74.

i. Post-Judgment Remedies--The Interests Involved

6.72 Among the most important elements of any creditors' remedies system are the processes available after judgment. Very few creditors in Alberta try any remedial action until they have obtained judgments against their debtors,[103] and this preference is likely to continue unless pre-judgment processes are made much easier to get. Before we outline our proposals, it seems appropriate to discuss the various interests and values which have to be considered before a fair, well balanced remedial system can be developed.

6.73 We earlier expressed our belief that the state should provide a reasonably effective system of collecting debts that are capable of being collected and that are not paid voluntarily.[104] From the creditor's point of view, such a system should be effective, speedy, cheap and to the greatest possible extent capable of operation without the intervention of lawyers. The creditor is also interested in a system which is free from unnecessary interference by government officers, be they judges, sheriffs or counsellors.[105]

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[102] There is the remote possibility that the writ might be used for purposes other than the role outlined in the text. See e.g., Parsons v. Burk, [1971] N.Z.L.R. 244, commented on in [1970] Camb. L.J. 183. We have not considered the other possible uses of the writ.

[103] Supra, paras. 2.14-2.35.

[104] Supra, para. 6.4.

[105] Cf. Debt Collection Report, paras. 6.2-6.7.

6.74 The debtor also has legitimate interests which are worthy of legal protection. The debtor and the debtor's family have a right to survive as a viable economic unit in society, not to speak of their personal rights to be protected from "harassment and undeserved hardship".[106] The social policy which supports an efficient creditors' remedies system must be modified by the proposition that human beings, including debtors, are themselves valuable.[107]

6.75 The debtor may therefore be interested in the existence of adequate exemptions legislation, judicial discretion to make instalment judgments and to stay execution, and in a range of bankruptcy or orderly payment of debts alternatives to the pure creditors' remedies system. The debtor may also want protection from those creditors who abuse, or at least over-use, the remedial system to the detriment of the debtor and of other, more patient creditors.[108]

6.76 The society at large is also interested in an effective creditors' remedies system. We want to protect the present credit system against loss of confidence and we therefore need a remedial system to which creditors can turn in the event of non-payment. The Tassé Committee made the point clearly:

> On the economic level, it is important to preserve public confidence in the credit

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[106] Kelly, p. 2. See also Dore and Kerr, pp. 240-42.

[107] Tassé Committee, pp. 85-88. Our concern for debtors' rights may be somewhat less in the case of a commercial rather than a consumer debtor.

[108] Dunlop Book, p. 9. Other third persons, such as the debtor's family and his employer, are also affected by the debt collection process. See Debt Collection Report, paras. 6.31-6.33.

> system of the country. "From the vantage point of borrowers and lenders, an important goal is continuity of credit facilities on reasonable terms for reasonably good risks."
>
> Without the means of protecting both debtors from harassment by their creditors and the credit extended by creditors, a loss of public confidence in the system could easily develop.[109]

6.77 An unsecured creditors' remedies system is available for use and is necessary for all judgment creditors, including tort claimants and consumers. A coercive remedial structure is the basic method of enforcement of all money judgments, whether the original claim arises out of a consumer transaction or not. The society is interested in the presence of an effective remedies system which should probably not, without clear reason, take a radically different form from the remedies available in other Canadian jurisdictions.[110]

6.78 There is a social interest in reducing the cost and complexity of the creditors' remedies system to the parties who use it and to the society as a whole.[111] If the system were perceived by creditors to be too expensive or complicated, they might refuse to use it. Instead they might resort to extra-legal debt collection practices of the type discussed in our report on the subject.[112] Alternatively creditors might avoid the problem by cutting off credit to risks presumed to be marginal.[113] Neither result is desirable.

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[109] Tassé Committee, pp. 87-88.

[110] Dore and Kerr, pp. 236-37, 247-48, 251.

[111] Dore and Kerr, pp. 229-31; Parker, pp. 156-60, 178-80.

[112] Debt Collection Practices. Some such reaction may be occurring in Northern Ireland to that jurisdiction's Enforcement Office. See supra, paras. 5.36-5.41. See also the Anderson article on a similar development in Texas.

6.79 The cost of the remedial system can be cut by eliminating overlapping procedures,[114] and legal technicalities and uncertainties.[115] There is a general value in simplifying court documents so that they will be readily understandable by all concerned, especially (in this case) the average debtor.[116] There is also an interest, shared by creditors and debtors alike, in simplifying the process so as to enable the parties to conduct the litigation themselves without the intervention of lawyers.

6.80 Even with these changes, it is not realistic to expect that the creditors' remedies system will pay its own way out of fees extracted from creditors and debtors. The cost of judges, sheriffs and other administrative staff, taken with the substantial overhead costs, is sufficiently large that the taxpayer will have to bear a large share, unless fees are raised to a very high level, as in Northern Ireland.[117]

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[113] The correlation between creditors' remedies law and credit granting policies is very hard to prove. See Dunlop Book, p. 11.

[114] Payne Committee, pp. 80-92; Dore and Kerr, p. 216.

[115] Supra, c. 3; also paras. 6.9-6.19; Whitford, pp. 1096-97.

[116] The Aust. L.R.C. Report, Discussion Paper No. 6, at p. 18, notes a recent Victorian study which indicated that the default summons in use in that state required reading skills associated with advanced secondary or some tertiary education, a level attained by few debtors. Moreover the summons is available only in English. One suspects that similar skills might be needed to decipher court documents in common use here, such as the writ of execution. See supra, paras. 3.22-3.24.

[117] See supra, paras. 5.36-5.41. On the possible harm caused by state subsidy of the creditors' remedies process, see Trebilcock and Shulman, pp. 460-61.

6.81 As a result, society has an interest in encouraging debtors and creditors to negotiate private settlements of their disputes rather than proceeding to litigation. We expressed this policy earlier in our report on debt collection practices:

> If a creditor commences a law suit against his debtor, he is causing the state to spend public money on what is a private dispute. Society cannot reasonably expect creditors or debtors to pay the whole real cost of invoking its legal machinery, but it is legitimate to hope that the parties will try to settle the dispute privately before or even after a law suit is commenced.[118]

6.82 It is apparent that our policy must necessarily be a compromise between conflicting goals. It is desirable on a variety of grounds, including cost, to encourage creditors and debtors to compromise their differences without going to court. On the other hand, if compromise is impossible or does not occur, the society wants the parties to litigate their differences rather than resorting to excessive harassment (on both sides) or harmful changes in credit granting policy. If relations between creditors and debtors are dealt with pursuant to legal rules enforced by the judicial system, then those relations are under the control of society as a whole.[119]

6.83 Another compromise is necessary on the issue of simplification of the legal system. Simplifying the law is likely to make it cheaper, quicker and easier to operate for lay people. However, potentially costly and time-consuming processes like the notice of objection--removal and sale procedure exist as protection for the debtor against wrongful seizure or other abuses of process. A compromise must be struck between the system which achieves simplicity and cheapness at the expense of due process, and the opposite system which makes every effort to be fair and which achieves individualized justice for each case, but which is never used because of its expense.

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[118] Debt Collection Report, pp. 32-33. See also Whitford, pp. 1117-18.

[119] Unlike loan-sharking, for example.

6.84 Another interest of society as a whole is to ensure that the creditors' remedies system is as fair to both creditor and debtor as is reasonably possible. Given the basic inequality in knowledge and experience of debtors as against creditors,[120] it is likely that creditors are better able to manipulate the system to their advantage.[121] If a creditor and a debtor are able to compromise their dispute, the same inequality may lead to the debtor being overreached in the bargaining process.

6.85 Society has an interest in overcoming this inequality between debtor and creditor. The goal may be attained by the creation of effective consumer education programs and by counselling of debtors in trouble. The debt collection process itself may be made more fair to debtors, although there are countervailing considerations of cost. It has been argued that reform agencies should not propose drastic restructuring of creditors' remedies in the absence of some knowledge of the economic consequences of their proposals.[122] This argument is difficult to meet in the absence of very complex economic analysis, but it may be avoided if we limit ourselves to moderate (not drastic) reform proposals which can operate in most Canadian and American jurisdictions without economic dislocation and with other advantages.[123]

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[120] See Cuming, "Protection of Consumer-Borrowers--Limitations on the Remedies of Consumer-Lenders" (1968), 33 Sask. L.R. 58, 72-74 (hereafter Cuming); Parker, pp. 146-51.

[121] See supra, paras. 5.3-5.8. See also Caplovitz, "The Social Benefits and Costs of Consumer Credit," in Goode, ed., Consumer Credit (1978), pp. 138-40.

[122] Supra, paras. 4.58-4.59, citing Cayne and Trebilcock.

6.86 The society is also interested in ensuring that the remedies available to creditors are not excessively harsh. A remedial system is by its nature coercive, the ultimate sanction being a forced transfer of assets from debtor to creditor.[124] Given this aim, it is still useful to bear in mind Bentham's advice, given in the course of a discussion of criminal sanctions but appropriate here, that punishment (and by extension the remedial process) is itself an evil, and that the legislator should not produce more of that evil than is necessary.[125]

6.87 There is a substantial body of evidence that the remedial process can hurt debtors.

> Some students have concluded that there is a relationship between harsh creditors' remedies and a range of social disasters, including personal bankruptcy, loss of employment (being fired or quitting), marital disruption, resort to welfare and even suicide. A study of garnishment orders in maintenance cases conducted for the Payne

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[123] Trebilcock himself found it possible to make substantial reform proposals. See Trebilcock and Shulman, pp. 453-67. See also Whitford and Laufer, "The Impact of Denying Self-Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act," [1975] Wis. L. Rev. 607.

[124] The coercive character of the remedial system can be justified as applying pressure to the parties to settle their dispute without initiating legal action or carrying it on to the bitter end. Supra, paras. 2.194-2.202.

[125] Bentham, An Introduction to the Principles of Morals and Legislation (1823), New York, Anchor Books, 1973, at pp. 182-83.

> Committee found that "of the 600 cases in which the order had been discharged, and in which the reason for discharge had been ascertained, 85 per cent (507) of the orders had been discharged because the respondent to the order had left his employment."[126]

Wage garnishment can pose a danger of the debtor losing his job, notwithstanding section 102 of the Employment Standards Act.[127] The use of creditors' remedies will cause significant economic dislocation and loss of property of the debtor[128] and may disable him from paying other creditors.[129]

6.88 In Report No. 42 on debt collection practices, we accepted this argument. While the relevant passage is expressed in terms of collection practices, it is relevant to the present discussion as well:

> Society is interested in ensuring that debt collection, whether judicial or extra-judicial, is not so harsh and punitive as to drive the debtor to leave his job (if he is not fired), to neglect his other obligations in order to pay the debt for which he is being pursued, or even to go on the welfare rolls rather than coping with his obligations....
>
> Society has an interest in encouraging over-burdened debtors to seek solutions which deal fairly with all of their creditors and which encourage rehabilitation of the debtor. Insofar as abusive debt collection efforts operate against this objective, they ought to

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[126] Dunlop Book, p. 12. See also Caplovitz, pp. 273-89; Parker, pp. 171-74; Scot. R.R. #5.

[127] R.S.A. 1980, c. E-10.1. See Ramsay Report, pp. 243-66, 271-75; Puckett, pp. 163-74.

[128] Especially if goods at sheriffs' sales sell for substantially less than their true value. See National Consumer Council, p. 89.

[129] Aust. L.R.C. Report, Report No. 6, p. 11, Parker, pp. 169-71, Tearle, pp. 266-67.

be discouraged.[130]

6.89 The charge of unfairness of the remedial system gains particular weight when we recall our earlier conclusion, reached on the basis of numerous empirical studies, that most debtors do not pay their debts because they are unable to do so, at least in the short run.[131] The remedial system works unfairly against the poor who are more prone to debt problems than the rest of society.[132] Certainly as far as the poor are concerned, society has an obligation to ameliorate the hurtful effects of the creditors' remedies system.

6.90 The above discussion indicates how difficult it is to reconcile the competing and contradictory interests at stake in the creditors' remedies system.[133] There can be no doubt that the society needs an effective remedial system which will collect judgment debts from those who are able to pay and which will serve as a deterrent to those tempted not to pay. However we recognize the unfairness of such a system when applied to debtors who do not honour their obligations because they cannot. We will consider below various ways to make the process fairer to such people, including consumer education and counselling programs, adequate exemptions and the removal and sale process.

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[130] Debt Collection Report, p. 42.

[131] Supra, para. 4.51. Of course most debtors are literally able to pay, no matter how dire their circumstances. The single mother on welfare can, for example, pay her bills by not feeding her children. By "inability to pay," we mean an ability which arises after the debtor provides for her, and her family's, basic survival.

[132] Dunlop Book pp. 9-13; Poverty in Canada: Report of the Special Senate Committee on Poverty (Canada, 1970), pp. 105-10 (hereafter the Croll Committee).

[133] The reform literature abounds with statements of the proper balance of interests. See e.g., Scot. Memo 47, pp. 26-31; National Consumer Council, pp. 77-78, 95.

6.91 To this point, we have looked exclusively at the provincial remedial system as governing the relationship between creditor and debtor. It cannot be forgotten that it is always open to the debtor to assign into bankruptcy[134] or to invoke the Orderly Payment of Debts scheme.[135] If the new Bankruptcy Bill is passed,[136] O.P.D. will be replaced with a variety of possible arrangements short of straight bankruptcy and designed to suit the individual case. The intention is to create a much more individualized service to the debtor, without ignoring the legitimate claims of the creditors.[137]

6.92 The provincial system starts from the assumption that debtors can and should pay their debts. At the outset of the debtor-creditor relationship, it is difficult to discriminate betwen can't pays and won't pays, and the provincial law has no formal screening system to do so.[138] However the choice is always available to the debtor (or the creditor) to escape from the provincial system by triggering the Bankruptcy Act. If the provincial remedial system operates unfairly, its impact can be avoided.

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[134] Bankruptcy Act, R.S.C. 1970, c. B-3, s. 31.

[135] Bankruptcy Act, supra, note 134, Part X.

[136] 1984 (Can), Bill C-17. The present Minister of Consumer and Corporate Affairs has indicated recently his intention to abandon the present Bill and to introduce a series of amendments to the present Act.

[137] It has been argued that creditors of insolvent commercial enterprises should be given incentives to petition their debtors into bankruptcy rather than trying to use the state remedial system. See LoPucki, "A General Theory of the Dynamics of the State Remedies/Bankruptcy System," [1982] Wis. L. Rev. 311, hereafter LoPucki.

[138] And we earlier rejected elaborate screening schemes of the sort discussed in c. 5. See supra, paras. 6.35-6.61.

6.93 The reform literature during the past decade has placed increasing emphasis on the need for consumer bankruptcies or arrangement orders.[139] Early examples of this sort of legislation are the consumer arrangement sections of the federal Bankruptcy Bills which have been introduced into the House of Commons or the Senate over the past 15 years.[140]

6.94 While our project has focussed on the provincial creditors' remedies system, we recognize the need for some form of consumer arrangement or bankruptcy which will be more flexible and widely accessible than the present Bankruptcy Act. We encourage the federal government to enact more extensive and flexible consumer arrangement and bankruptcy provisions. We urge the provincial government to continue its present participation in Part X of the Bankruptcy Act[141] (Orderly Payment of Debts) and to look favourably on participation in any new federal consumer arrangement and bankruptcy legislation.

j. A New Post-Judgment Remedy

(1) Problems with the Present Law

6.95 At present, the law makes available to judgment creditors several remedies, the most commonly used being execution and attachment of debts. The discussion of the post-judgment remedies in chapter 2[142] revealed serious problems with the remedial process, judged by the interests outlined in the immediately preceding section.

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[139] See e.g., Insolvency Law and Practice: Report of the Review Committee (London, 1982), Cmnd. 8558 (hereafter the Cork Committee); Scot. Memo. 50; Aust. L.R.C. Report, Report No. 6. See also Whitford, pp. 1100-05, 1140-41.

[140] See now Bankruptcy Bill, 1984 (Can.), Bill C-17, ss. 63-97. See Parker, pp. 236-56.

[141] Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 188-213.

6.96 The creditor may legitimately complain of the following defects in the present law:

(1) The existence of two remedies, one available against property and the other against debts due to the debtor, creates problems with assets which fall between the two remedies or are caught in part by one remedy and in part by the other.[143]

(2) The sheriff's powers may be limited to seizing and selling assets, a procedure which is inadequate to exploit potentially valuable assets such as shares, R.R.S.Ps., some bank accounts and the vendor's interest in conditional sales agreements.[144]

(3) From the creditor's point of view, the seizure and sale process does not work very well. It is slow, ineffective against some kinds of property, and produces little money at the end of the day.[145] The defects of the process are related in part to defects in the law and in part to inadequacies in the training and supervision of the sheriffs and bailiffs who operate the

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[142] Supra, paras. 2.57-2.158.

[143] Supra, para. 2.86. On the problems created by several overlapping remedies, see Payne Committee, pp. 82-85; South Australia, Thirtieth Report Relating to the Reform of the Law on Execution of Civil Judgments (1974), p. 1--hereafter S. Aust. L.R.C.

[144] Supra, paras. 2.87-2.89.

[145] Supra, paras. 2.173-2.193. There may of course be payments directly from debtor to creditor which would not be caught in our empirical study.

system.[146]

(4) The attachment of debts process operates better but is still technically flawed as a remedy against wages or bank accounts.[147]

6.97 From the point of view of the debtor, the system can be criticized on a variety of grounds:

(1) Debtors are not as a matter of right informed of their defences and protections under the present law,[148] the existence of debt counselling services like the Family Financial Counselling Service, and of more radical solutions to their debt problems such as the orderly payment of debts system and straight bankruptcy.

(2) In our 1978 exemptions working paper, we noted that exemptions are presently unequal and capricious, ranging from generous for some debtors to parsimonious for others.

(3) Some remedies can operate harshly against the debtor. This is certainly true of execution if sheriffs' sales do not realize an adequate and reasonable return for goods sold.[149]

6.98 From the point of view of society as a whole, the existing post-judgment remedies do not look any better. They are expensive, time-consuming, badly organized and not particularly productive. The existence of two separate remedies, execution and attachment of debts, to attach the debtor's property leads to uncertainty as to which remedy applies to certain assets or whether both must be used in tandem. Reform at a fundamental level appears to us to be appropriate.

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[146] Supra, paras. 2.97-2.98, citing Dunlop Report, c. 6.

[147] Supra, paras. 2.117-2.140.

[148] Although debtors whose goods are seized are given copies of blank notices of objection to seizure and (apparently) told of their right to sign and return the notice.

[149] Although we are not sure that this is a fair criticism of the Alberta sheriff's sale. See supra, para. 2.103.

(2) The Enforcement Order

6.99 In our view, it is not enough simply to patch up the existing remedies. We therefore tentatively recommend that all existing remedies for the enforcement of money judgments should be abolished[150] and replaced by one new remedy, to be called the enforcement order (hereafter E.O.). This new process will be designed to catch all real and personal property of the judgment debtor, including debts owing to him or her.

6.100 The idea of an all-encompassing enforcement order is not new. The Ontario Law Reform Commission has made a very similar proposal for that jurisdiction,[151] and Nova Scotia,[152] followed by Prince Edward Island,[153] introduced such an order in their new rules of court. We are indebted to these models.

6.101 The justification for replacing the existing remedies with one process is that the latter should be more efficient. It is probably more satisfactory to provide that the one remedy can get at everything than to try to delineate an artificial margin. It is better that the creditor be able to function with one piece of paper than with two and one attendance at the clerk's office instead of two, and it is probably more efficient that all administration be in one place. There is the further point that the one document could be written in English and say what it means; no doubt the writ and the garnishee could be translated and simplified so that they would do this, but then it might as well all be done in one document.

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[150] One exception to this general policy of abolition is the remedy of equitable execution. See below, para. 6.185.

[151] Ont. L.R.C. Report, vol. 1, pp. 123-25.

[152] Nova Scotia, Civil Procedure Rules, rr. 52-53 (hereafter N.S. Rules).

[153] Prince Edward Island, Rules of Court, rr. 52-53. The P.E.I. Rules are almost identical to those in N.S. We will henceforth refer entirely to the N.S. Rules.

6.102 In this report, we will not work out all the details of our proposal, but we will sketch in the basic characteristics of the E.O. Here again we emphasize the tentative character of our proposals. The substitution of one enforcement process in place of the present remedies would be a radical change in Alberta law. We are anxious to get comment on all aspects of our proposed enforcement order.

(3) E.O. a Post-Judgment Remedy

6.103 In our tentative view, the E.O. should be available only after judgment. We earlier proposed[154] the imposition of strict limits and conditions on the grant of pre-judgment relief. The E.O. is easier to obtain and, for that reason, should be available only to creditors who have established their claims.

6.104 In chapter 2,[155] we noted an anomalous practice relating to the issue of a writ of execution or a garnishee summons. Where a default judgment is obtained and a writ of execution is issued, the judgment may later be set aside pursuant to Rule 158, usually to permit a defence to be filed. What happens to the writ?[156] One might assume that the writ would fall with the judgment, but there are reported decisions where writs have been ordered to remain in place, despite the setting aside of the judgment.[157]

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[154] Supra, paras. 6.62-6.71.

[155] Supra, paras. 2.61-2.62.

6.105 We have tentatively concluded that these cases are wrong in principle, and that the Rules should be amended to prohibit this practice. Once a judgment has been set aside, it is as though the plaintiff has no judgment against the defendant. If the plaintiff then wishes to obtain pre-judgment relief, he or she should have to satisfy the more stringent requirements which surround pre-judgment remedies, rather than being permitted to retain the relief obtained more easily while the judgment existed. Pre-judgment remedies are inherently dangerous, and should be granted only in clear cases. The issue of an order under Rule 158 may often be subject to conditions, but the continuation of an E.O. should not be one of them.

(4) Issue of E.O.

6.106 The E.O. should be issued out of the clerk of the court's office. We do not deal here with the right to issue more than one E.O.,[158] although our later proposals on its province-wide operation may make the issue of multiple E.Os. much less common. Every effort should be made to draft the standard form of the E.O. in language which will be readily understandable.[159]

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[156] Or the garnishee summons.

[157] Supra, para. 2.61, note 92. Our empirical research turned up no orders of this sort. Supra, para. 2.62.

[158] Supra, paras. 2.71-2.72.

6.107 At present, the writ of execution which has been issued in the clerk's office but not delivered to the sheriff's office has no binding effect on the judgment debtor's property and will not entitle the creditor to share in distributions under the Execution Creditors Act.[160] We think that this rule should apply to E.Os., and we so recommend. We also tentatively recommend that a judgment creditor who has issued an E.O. may, in his or her discretion, deliver it to the sheriff's office.[161]

(5) Effect of Filing E.O. in Sheriff's Office

6.108 The next question is to decide what effect the E.O. will have, once it is filed in the sheriff's office. There are three issues to be settled, two of which are relatively simple:

(i) The writ of execution, upon its delivery to the sheriff, does not operate as an immediate instruction to the sheriff to seize,[162] despite the apparently peremptory form of the writ which appears in the Rules.[163] It is necessary for the creditor expressly to instruct the sheriff in writing to seize.[164] Our tentative view is that the same rule should apply to the E.O. which should so state.[165]

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[159] The educational level of the average default debtor is lower than the average for the population as a whole. See *supra*, para. 4.12.

[160] *Supra*, para. 2.79.

[161] The argument for preserving the creditor's discretion in the enforcement process was made earlier. See *supra*, paras. 6.35-6.61. We will later consider whether the present system of sheriffs appointed for individual judicial districts should be replaced by one province-wide sheriff administering E.Os. with a province-wide effect. See *infra*, paras. 6.124-6.135.

[162] Dunlop Book, p. 384.

(ii) The holder of a writ of execution which is filed in the sheriff's office and kept up to date by the annual filing of payment notices is entitled to share pari passu in the proceeds of another creditor's execution or garnishment effected in the same judicial district.[166] Our tentative view is that the same rule should apply to the E.O., but the question depends on our later discussion of judicial districts and of the Execution Creditors Act.[167]

(iii) 6.109 The third issue to be considered is the binding effect of the E.O. on the debtor's property. The problem cannot be understood without describing in some detail the present law.

6.110 The common law did not give the creditor's money judgment any binding effect against the property of the judgment debtor,[168] and the Institute does not intend to alter this result. The writ of execution did bind the personalty of the debtor, but the history is complex. Professor La Forest has described the development of the common law and statutory rules as follows:

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[163] Alberta Rules of Court, Schedule A, Form F.

[164] Execution Creditors Act, R.S.A. 1980, c. E-14, s. 4(1).

[165] Cf. Ont. L.R.C. Report, vol. 1, pp. 136-38. Our tentative view assumes the continuation of the pari passu sharing philosophy of the Execution Creditors Act.

[166] Supra, para. 2.81.

[167] R.S.A. 1980, c. E-14.

[168] See Dunlop Book, pp. 55-60.

> At common law, the writ had effect from its teste. As soon as it was issued it bound the goods of the execution debtor into whosoever hands they came. So that if an execution debtor sold his goods after the issue of the writ, the execution creditor had a right to seize them even as against a *bona-fide* purchaser for value without notice. The English Statute of Frauds [1677, (29 Car. 2), c. 3, s. 16] made an important alteration to this law. It provided, in effect, that the writ should not bind the goods of an execution debtor until it was delivered to the sheriff to be executed ...
>
> It should be observed that the provision in the Statute of Frauds merely postpones the time when the writ binds the goods of the execution debtor; it does not otherwise alter the law. So that if a judgment debtor sells goods to an innocent purchaser after the writ has been placed in the hands of the sheriff for execution, the sheriff may seize the goods in the hands of the innocent purchaser.
>
> This blemish on the law was removed in England by section 1 of the Mercantile Law Amendment Act, 1856 [(19 & 20 Vict.), c. 97, s. 1], which provided that no writ of *fieri facias* should prejudice the right of any person to goods acquired from an execution debtor in good faith, for valuable consideration and without notice. This section and the provision of the Statute of Frauds just mentioned, were re-enacted by section 26 of the English Sale of Goods Act [1893 (56 & 57 Vict.), c. 71].[169]

6.111 As far as tangible goods are concerned, Alberta has adopted the modern English position that the writ of execution binds the debtor's goods from the date of delivery of the writ to the sheriff, but that bona fide purchasers before seizure[170] are protected. Section 4 of the Seizures Act[171] provides as follows:

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[169] La Forest, "Some Aspects of the Writ of Fieri Facias" (1959), 12 U. New Brunswick L.J. 39, at 40.

[170] Although whether the bona fide purchaser exception continues to exist after seizure is a matter of debate. See infra, paras. 6.168-6.178.

> 4 A writ of execution from the delivery thereof for execution to a sheriff binds the goods of the judgment debtor situated within the judicial district of that sheriff, but not so as to prejudice the title to the goods acquired by any person in good faith and for valuable consideration, unless that person had at the time when he acquired his title notice that the writ had been delivered to the sheriff and remained in his hands unsatisfied.

The term "writ of execution" as used in the Act is defined to include "a writ of attachment",[172] apparently meaning the writ of attachment of property before judgment created by rules 485-93 of the Alberta Rules of Court.

6.112 Two significant limits to this rule should be noted.

(1) The courts have held that provisions like section 4 apply only to assets exigible at common law, i.e., tangible goods and chattels. As to property made exigible by the Judgments Act, 1838[173] or subsequent English or Alberta legislation,[174] the rule is that such assets are not bound at all before actual seizure.[175]

(2) As to land, the rules are different.[176] The execution

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[171] R.S.A. 1980, c. S-11.

[172] S. 1(i).

[173] (1 & 2 Vict.), c. 110.

[174] E.g., the securities for money, shares and registered mortgages or encumbrances on land or chattels made exigible by ss. 6, 7 and 8 of the Seizures Act.

[175] Dunlop Book, p. 147.

[176] See supra, paras. 2.104-1.114.

creditor who wishes to bind land of the debtor first files the writ with the sheriff to whom it is directed and then files a certified copy of the writ in the land titles office for the registration district where the execution debtor may have land.[177] The writ is almost always filed in the general register against the name of the execution debtor.[178] Subsection 122(2) of the Land Titles Act[179] says that the writ filed in the land titles office binds "all legal and equitable interests of the execution debtor in any land there or thereafter registered in his name." As to some interests in land referred to in the Seizures Act,[180] it is possible that they are bound by the filing of the writ in the sheriff's office alone, although such interests could not be sold under seizure until a writ had been filed in the land titles office and a year had expired from the filing.[181]

6.113 The question of the binding effect of the writ against land will be considered later in this report.[182] Our immediate concern will be the writ's effect on personalty.

6.114 What is meant by the binding effect of the writ has been discussed as follows:

> With very few exceptions, the cases are

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[177] It is rare that the execution creditor files in both land registration districts. See supra, para. 2.110, note 176.

[178] Land Titles Act, R.S.A. 1980, c. L-5, s. 17(3).

[179] R.S.A. 1980, c. L-5.

[180] R.S.A. 1980, c. S-11, s. 5(1)--leasehold interest in land; s. 8(1)--a mortgagee's interest in land where mortgage is registered.

[181] Seizures Act, R.S.A. 1980, c. S-11, s. 15(1)(b).

[182] See infra, paras. 6.195-6.196.

> clear that the delivery of the writ to the sheriff does not transfer any property to the judgment creditor or to the sheriff....Not only may the debtor sell his goods; he may also move them into another bailiwick, thus frustrating the process.
>
> What is meant by the "binding" effect of the writ is that it gives the sheriff the right to seize the goods in the hands of the debtor and also in the hands of any transferee, except for a sale to a *bona fide* purchaser (in jurisdictions which have enacted the Mercantile Law Amendment Act) or a sale in market *overt*. The fact that the debtor owned the goods he purported to sell does not matter; the execution creditor can follow and seize them in the hands of the new owner. "That is his right, as it is the purchaser's misfortune."
>
> ....
>
> Whatever rights are acquired by the creditor by virtue of delivery of his writ to the sheriff, they survive until the writ is executed by seizure and sale of the goods or until it ceases to be effective by failure to renew or otherwise.[183]

6.115 The advent of personal property security legislation has caused law reformers to rethink the present law as to the binding effect of the writ.[184] Saskatchewan, alone among Canadian jurisdictions, has changed the old law to fit better with the PPSA. Section 2.2 of the Executions Act[185] provides:

> 2.2 Every writ of execution issued against goods on or after the coming into force of *The Personal Property Security Act*, binds, from the time of its delivery to the sheriff to be executed, all the goods of the judgment debtor within the province, and, if it is registered, takes priority over a security interest which has not been registered or which is registered after the writ of

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[183] Dunlop Book, pp. 148-49.

[184] See Ziegel and Cuming, "The Modernization of Canadian Personal Property Security Law" (1981), 31 U. of T. L.J. 249, at pp. 271-77.

[185] R.S.S. 1978, c. E-12.

> execution is registered, but does not take priority over:
>
> (a) a *bona fide* sale by the judgment debtor, accompanied by immediate delivery and an actual and continued change of possession of the goods sold, without actual knowledge to the purchaser that a writ is in the hands of the sheriff or that a seizure has been made;
>
> (b) the interests of a secured party who has taken possession of the goods before the writ of execution is registered;
>
> (c) the interests of a secured party who has taken a purchase-money security interest that is perfected pursuant to *The Personal Property Security Act* before or within 15 days after the debtor obtains possession of the goods, whether perfected before or after registration of the writ of execution.

The terms "purchase-money security interest" and "registered" are defined in section 2:

> (b) "purchase-money security interest" means:
>
> (i) a security interest that is taken or reserved by a seller, lessor or consignor of goods to secure payment of all or part of its sale or lease price; or
>
> (ii) a security interest that is taken by a person who gives value for the purpose of enabling the debtor to acquire rights in or to the goods, to the extent that the value is applied to acquire such rights.
>
> (c) "registered" means, in connection with a security interest or a writ of execution, registered in the Personal Property Registry in accordance with *The Personal Property Security Act* and the regulations made under that Act.

Other sections in the Act[186] provide for the mechanics of registration of the writ in the personal property registry.

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[186] Ss. 31-31.2.

6.116 The Saskatchewan legislation raises interesting issues which will be discussed later in this chapter. At present, however, we wish to focus on the root issue of the writ's binding effect. There would appear to be three alternative positions which we could adopt.

(a) The E.O. could at the time of delivery to the office of the sheriff bind all property of the debtor. This rule has the virtue of defeating transfers or gifts of property after the date of delivery without the need for commencing an action alleging a fraudulent conveyance or preference. However it could operate harshly against third persons to whom the debtor transferred or gave property after the date of the E.O.'s delivery, especially if the legislation contained no bona fide purchaser exception.[187] The effect on third persons would be lessened by the adoption of a registration requirement as in Saskatchewan.

(b) The E.O. could bind property of the debtor only at the date of seizure of the property. This rule would, depending on the definition of "seizure", protect transferees from the debtor but could open the door somewhat more broadly to fraudulent conveyances and preferences.

(c) The date of delivery of the E.O. could be the significant time for some assets, and the date of actual seizure for others. This is the present law of Alberta.[188]

6.117 The Institute has considered each of these alternatives carefully and has concluded that the second possibility, that the E.O. should bind property of the debtor only on seizure, is the best solution. The history of the rule suggests a gradual movement towards seizure as the appropriate point in time when the debtor's ownership of personalty should first be affected by the creditor's efforts to collect the debt. The common law judges were clearly unhappy with the writ having a binding effect before seizure, as evidenced by the cases which held that property first made exigible by statute in 1838 or later was not bound until actual seizure had occurred.

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[187] As exists at present. See Seizures Act, R.S.A. 1980, c. S-11, s. 4.

[188] And this is the position taken by the Ont. L.R.C. Report.

6.118 Making the writ bind at the time of delivery to the sheriff may have been acceptable at common law where there was no legislation like our Execution Creditors Act[189] and where a writ became dormant if it was not followed promptly by instructions to seize.[190] However, Canadian jurisdictions like Alberta which have Execution Creditors Acts permit, indeed encourage, creditors to file writs with the sheriff with no intention to seize in the hope that the writ will share in the fruits of another's seizure or attachment, perhaps many years in the future. The result is that an execution debtor's goods can be bound by one or more writs which were filed years earlier so long as they have been kept renewed. This continuing flaw in the debtor's ownership of tangible goods and chattels is dangerous to third persons who deal with the debtor directly or with transferees of the goods from the debtor.

6.119 A potential danger with our proposed rule is that debtors may before seizure transfer away exigible property.

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[189] R.S.A. 1980, c. E-14.

[190] Dunlop Book, pp. 370-71.

However the creditor has remedies available. He or she can commence an action under the Statute of Elizabeth[191] or the Fraudulent Preferences Act,[192] or petition the debtor into bankruptcy, thus triggering the trustee's powers to avoid fraudulent transactions.[193] Alternatively, the creditor can instruct seizure immediately rather than waiting for some other creditor to act. When we balance the execution creditor's interests against those of people dealing directly or indirectly with the debtor, we think that the latter should be preferred.

6.120 We therefore tentatively propose that the E.O. should bind personal property of the debtor only from the time of actual seizure of the property.

(6) Public Register of E.Os.

6.121 Despite our conclusion, stated in paragraph 6.120, that the E.O. should bind personal property of the debtor only upon actual seizure, a creditor may still have two reasons to want to file the E.O. with the sheriff:

(i) The creditor may want to instruct seizure, and filing the E.O. with the sheriff is a necessary first step.

(ii) He or she may want to share in the proceeds of other creditors' executions or attachments, without personally taking active enforcement measures.

It is likely that substantial numbers of creditors will want to file their E.Os. with the sheriff. Public access to the registry of E.Os. is a matter of importance, particularly to other creditors. At present, however, a creditor who wishes to search for writs against a person is faced with two barriers. First, he or she must decide which Alberta judicial district or districts is or are likely to record enforcement proceedings against the person. Secondly, the filing of writs and related documents in Alberta sheriffs' offices is not sophisticated, and there is a real chance that relevant documents will be lost or misfiled and therefore will not be available to be searched.

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[191] 1571 (13 Eliz. 1), c. 5.

[192] R.S.A. 1980, c. F-18.

[193] Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 69-79.

6.122 An adequate public register of enforcement orders has been recommended by many reform agencies.[194] Three reasons are commonly advanced:

(i) The register would be a source of information about the credit-worthiness of people to whom suppliers of goods and services were thinking of supplying credit. The Anderson Committee advanced this argument forcefully:

> We do not think that we can over-stress our recommendations relating to the establishment of such a register. It would remove every excuse that at present exists for the irresponsible giving of credit, and, if properly used by the business community, must lead to a decline in the number of enforcements which are unproductive.[195]

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[194] Anderson Committee, pp. 16-18; Payne Committee, pp. 306-14; N.S.W. Draft Proposal, pp. 13, 36-41; Dore and Kerr, pp. 351-52; Ont. L.R.C. Report, vol. 1, pp. 145-53. The Scottish Law Commission, in Scot. Memo. 47, pp. 59-61, recommended against a central register of court decrees, primarily on the ground that there were adequate private publications of decrees against debtors.

[195] Anderson Committee, p. 18. See also Payne Committee, pp. 306-07.

(ii) If a creditor is thinking of launching active enforcement proceedings, the register will give some idea whether such an action is likely to be successful or not.

(iii) Where it is desirable or essential to concentrate enforcement proceedings in one judicial district, a search of registers of other districts will reveal the existence of parallel enforcement activities which should be consolidated.[196]

6.123 If a register is to be adequate in a province where debtors may easily move from one judicial district to another, it should be developed on a province-wide basis. This is one of the Ontario Commission's proposals,[197] and we agree with it. We recognize that a province-wide register of E.Os. would involve the computerizing of this information, which is costly. However there are substantial benefits to a computerized register, including the reduction of filing and retrieval errors, the convenient retrieval of information anywhere in the province where access can be made to the system, and the possibility, already discussed, of a province-wide register. We therefore tentatively recommend that the Department of the Attorney General should establish a computerized register of E.Os., showing as much information on actions taken under the E.Os. as is feasible.[198]

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[196] Dore and Kerr, pp. 351-52; Ont. L.R.C. Report, vol. 1, pp. 145-49.

[197] Ont. L.R.C. Report, vol. 1, p. 149.

[198] See also N.S.W. Draft Proposal, p. 36. The Ont. L.R.C. Report, vol. 1, at pp. 145-53 is useful on the details of such a register, including the problem of debtors with similar names, and the right to privacy.

(7) E.O. has Province-wide Effect

6.124 At present, Alberta is divided into judicial districts, and a sheriff is appointed by the provincial government for each district.[199] When a writ of execution is issued, it is directed to the sheriff of a specific district.[200] Dunlop describes the legal consequences of the limited geographical effect of writs and the limited jurisdiction of sheriffs as follows:

> It has always been clear law that where a sheriff is appointed for a county or judicial district, his authority is limited to that area; if he executes a writ elsewhere, he is a trespasser. Even if he has properly seized goods, he cannot remove them outside his county without being liable in damages. It may be that a sheriff may do any act outside of his county which a private individual may do, such as serve a writ of summons, but he cannot act officially out of his county. These rules have been varied by legislation in some jurisdictions to empower a sheriff to act anywhere within the province. Failing such statutory modification, the old law remains in force and will be strictly applied.[201]

6.125 In a province where debtors may move from one district to another or may have assets in two or more districts, such geographical limitations cause substantial inconvenience. Our empirical study found some evidence of this inconvenience in the use of multiple writs:

> Rule 346 permits a creditor to issue more than one writ of execution, and the common law appears to contemplate that multiple writs may be issued to the same

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[199] Supra, para. 2.77.

[200] Alberta Rules of Court, Schedule A, Form F.

[201] Dunlop Book, pp. 384-85.

> sheriff or to sheriffs of different judicial districts. The Dunlop empirical study found that 221 judgment creditors, or 12% of those who used the execution remedy, issued more than one writ of execution.
>
> Solicitors acting for creditors appear to issue multiple writs for at least two reasons:
>
> (1) When the judgment is against two or more debtors, some solicitors issue separate writs for each judgment debtor. This was true in 9% of the multiple writ cases.
>
> (2) Solicitors issue one original writ, usually directed to the sheriff of the judicial district in which the judgment was obtained, and an alias writ directed to the sheriff of another judicial district. This was the reason for the issue of more than one writ in 91% of the multiple writ cases.[202]

6.126 Other problems arise from the geographical limits to the writ and to the sheriff's authority. If the creditor issues only one writ directed to the sheriff of a judicial district, it will bind property of the debtor in that district but not elsewhere. If the sheriff is instructed to seize pursuant to the writ, his or her activities are limited to the bailiwick. If a successful seizure and sale or garnishment is conducted in one judicial district, creditors with writs filed in other districts will not be able to share in the proceeds.

6.127 Other Canadian jurisdictions have overcome some of these problems by legislation. The British Columbia Sheriff Act provides that the sheriff "has jurisdiction throughout the Province to exercise all the powers and perform all the duties imposed on him under this or any other enactment."[203] The effect of this section is that the bailiwick of each sheriff becomes in law the entire province.[204] In practice, the Vancouver sheriff will not travel to St. John to execute a writ but will forward it to the appropriate district.[205] New Brunswick[206] and Saskatchewan[207] have somewhat the same rule.

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[202] Supra, paras. 2.71-2.72.

[203] Sheriff Act, R.S.B.C. 1979, c. 386, s. 4.

6.128 The Ontario Commission has proposed a different answer to the problem. They recommend that "the basic organizational unit of the enforcement of judgment debts system should be a new, integrated enforcement office established in each county under the direction of a sheriff."[208] They consider but reject the centralization of enforcement activities into one province-wide system.[209] Active enforcement measures taken in respect of any one debtor should be restricted to one enforcement (i.e., sheriff's) office.[210] There follows a series of rules governing the choice of the proper office and transfer of enforcement proceedings to and from that office.[211]

6.129 The Commission also recommends that the writ of execution should have a province-wide binding effect, citing the Saskatchewan Executions Act[212] as a precedent. They put their recommendation as follows:

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[204] Turriff and Edinger, p. 137.

[205] Loc. cit.

[206] Sheriffs Act, R.S.N.B. 1973, s. S-8, ss. 4-5.

[207] Court Officials Act, S.S., c. C-43, ss. 18-21.

[208] Ont. L.R.C. Report, vol. 1, pp. 115-16.

[209] Ibid., pp. 116-17.

[210] Ibid., pp. 124-25.

[211] Ibid., pp. 125-36. The Scottish Law Commission has adopted a similar position. See Scot. Memo. 51, pp. 42-46.

[212] See now Executions Act, S.S., c. E-12, ss. 2.1-2.2.

> The Commission is of the view that the county-wide scope of the binding effect of a writ, reflecting as it does the historical origins of the writ and of a sheriff's jurisdiction, cannot be justified as a matter of policy. Accordingly, we recommend that a writ of enforcement filed in any enforcement office in Ontario should bind a debtor's goods throughout the Province, in the same fashion as a writ of execution now binds a debtor's goods within the county in which it is filed.[213]

6.130 However the Commission is at pains to make clear that their recommendation "does not involve changes in the organizational structure of the enforcement of judgment debts system and does not impose any new obligations on persons who wish to acquire an interest in a debtor's chattels."[214]

6.131 In the next paragraph, the point is put more specifically:

> However, we do wish to emphasize that our recommendation is limited to the binding effect of a writ; it should not affect the method by which a creditor can have goods seized in a county other than the one in which the writ has been filed. For example, while a writ filed in Toronto would bind the debtor's goods in Hamilton, the goods could not be seized by the sheriff responsible for Toronto. The method of actually having an enforcement officer seize and sell the goods in Hamilton would have to follow the rules recommended by the Commission in Part I of its Report. If, for example, having regard to our proposed rules, the sheriff in Toronto had carriage of active enforcement, he would have to effect a full or partial transfer of his enforcement jurisdiction to the sheriff responsible for Hamilton in order for the latter sheriff to seize and sell the goods in that city. Again, it is important to distinguish between the legal binding effect of a filed writ of enforcement and the means by which an actual seizure of bound goods is

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[213] Ont. L.R.C. Report, vol. 2, p. 17.

[214] Loc. cit.

effected.[215]

6.132 The Ontario proposal is clearly a limited one. It would expand the binding effect of a writ to operate province-wide and might eliminate the need for multiple writs directed to different sheriffs. However, once the creditor wanted to instruct active enforcement, the county system would re-assert itself. One county enforcement office would have to be chosen, but that sheriff could not act outside his bailiwick. Instead the file would have to be transferred to the more appropriate sheriff. The Commission also makes it clear that the distribution of enforcement proceeds under the equivalent to the Execution Creditors Act would still be organized on a county basis.[216]

6.133 We have already decided that the E.O. will not bind the personalty of the debtor until actual seizure.[217] However we are attracted by the idea that, once the E.O. is filed with any Alberta sheriff, it should be effective province-wide for two purposes:

(i) it should be capable of supporting seizure or other enforcement processes anywhere in the province,

(ii) it should be entitled pursuant to the Execution Creditors Act to share in the fruits of an execution or garnishment conducted anywhere in the province.

We think that the need for multiple E.Os. could be eliminated by directing the document to all of the Alberta sheriffs. These proposals, we suspect, depend on the creation of a computerized register of E.Os. and constitute another reason for that register.

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[215] Ont. L.R.C. Report, vol. 2, p. 18.

[216] Ont. L.R.C. Report, vol. 5, p. 78.

[217] _Supra_, para. 6.120.

6.134 However we wonder whether it is possible to go further than the Ontario Commission and to create a province-wide enforcement office, the employees of which have the power to operate province-wide. It may be that, for the sake of organization and convenience, there will continue to be branch offices located in each judicial district. But we do not understand why their powers need to be limited in the way that the Ontario Commission proposes. If the present organization were replaced by a province-wide sheriff's office, seizures would not be limited by judicial district boundaries, nor would distributions under the Execution Creditors Act be divided in the same way. The Ontario Commission's rules regarding the best enforcement office to carry on enforcement might still be necessary, but as an internal administrative policy rather than a rule of law.

6.135 Before making firm recommendations on the organization of the sheriffs' office in Alberta, we need to get comment, particularly from sheriffs and the Department of the Attorney-General. However we are prepared now to recommend that the E.O., once filed with any sheriff in the province, (i) should be effective to support seizures or other enforcement processes anywhere in the province, and (ii) should be entitled pursuant to the Execution Creditors Act to share in the fruits of an execution or garnishment conducted anywhere in the province.[218] We invite comment on the creation of a province-wide sheriff's office and the consequent elimination of limitations based on the boundaries of judicial districts on the powers of the sheriff and on distributions under the Execution Creditors Act.

(8) Instructions to Enforce the E.O.

6.136 Once the E.O. is filed with the sheriff, we tentatively recommend that the creditor may at any time during the life of the E.O. instruct the sheriff to enforce it. We earlier proposed that the creditor should be required to give to the sheriff express written instructions to enforce.[219] The law presently requires that the creditor give the sheriff other documents and promises of security before the latter must undertake a seizure.[220] We will not discuss these requirements at present, but we invite comment.

6.137 It is apparent from the last paragraph that the question of "the life of the writ" is an important one. We earlier noted that the limitation periods applicable to the execution process are sufficiently uncertain and complicated to form a trap for the unwary solicitor.[221] The Institute is in the final stages of preparing a report for discussion on limitations which will touch on the subject. In the present study, we intend to develop recommendations on the duration of an E.O., once issued. We have not yet worked out our proposals, but we would invite comment on limitations on enforcement of judgments generally.

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[218] In a later section, we will consider the relationship of these proposals to execution against land. See infra, paras. 6.195-6.203.

[219] Supra, para. 6.108(i).

[220] See Execution Creditors Act, R.S.A. 1980, c. E-14, s. 4(2)--security. The Seizures Act, R.S.A. 1980, c. S-11, ss. 25 and 26 are read as imposing on the creditor the duty to supply the sheriff with notices of seizure, notices of objection to seizure, and a stamped envelope addressed to the sheriff. See Alberta Bar Admission Course, Creditors' Rights and Remedies (1981-82), p. 61. We will discuss later the creditor's duty to provide the sheriff with information as to the debtor's assets.

(9) The Sheriff

6.138 In our recommendations to this point, we have talked about the office of the sheriff. It is now necessary to say something about that important personage in the enforcement process. Earlier in this report,[222] we traced the development in Canada from the independent contractor sheriff to the civil service sheriff, i.e., an employee of the provincial government and a member of the public service. This movement has been criticized,[223] and there are jurisdictions where the sheriff (in our sense) remains an independent contractor.[224] However our view is that the sheriff's function is properly one to be operated by the government, and we propose no change in the situation.

6.139 While we prefer that the sheriff remain a part of the public service, it is clear that his office should be run as efficiently as possible in the interests of all parties, not the least of whom are the creditors. In our empirical study of the remedial system in Alberta, we made some observations about the operation of the three sheriffs' offices studied.[225] Those observations are summarized earlier in this report as follows:

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[221] Supra, para. 2.116.

[222] Supra, paras. 2.74-2.77.

[223] Turriff and Edinger, pp. 3, 232-42.

[224] E.g., Scotland. See Scot. Memo. 47, pp. 9-10, 41-43, 101-08; Scot. Memo. 51, pp. 7-15, 28-33.

> The researchers were not professional social scientists, and their observations are by no means systematic or complete. However it is still useful to record their general view that, in 1982 and 1983, a judgment creditor might have difficulty executing on a judgment because of the structure of the sheriffs' offices and the training and attitude of the sheriff's officer who was responsible for the file. This was so despite the fact that the creditor had acted bona fide and had received a valid judgment and writ of execution from a court with jurisdiction to grant the relief.[226]

6.140 The details which underlie the above conclusion are set out in our Research Report[227] and need not be repeated here. The data in the Report was collected in 1982 and 1983, and our conclusions about the sheriffs' offices were fair assessments as of those dates (although we invite feedback). As a result of the publication of the Report, we have received some comments suggesting that changes have been made in the operation of the sheriffs' offices in Alberta. We have not had a chance to look into these changes before publishing this report for discussion, and we invite comment on the present operation of the sheriffs' offices. Our general attitude is to leave questions of appointment and administration of the sheriffs' offices to the responsible officers of the Attorney General's Department (although we welcome other views). On the question of the officer's education as we found it in 1982 and 1983, we would have concluded that the initial training (which ranged from one to "several" days[228]) and continuing education was inadequate and should be substantially increased and improved.[229] It has again been suggested that the training of sheriffs' officers has improved since 1983. We intend to investigate this question, but we invite comment.

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[225] Dunlop Report, c. 6.

[226] Supra, para. 2.98.

[227] Dunlop Report, c. 6.

k. Information About the Debtor's Assets

6.141 In order to seize assets of the debtor, it is necessary for the sheriff to know what property the debtor has. The common law made the sheriff responsible to know his or her own bailiwick and to use reasonable diligence in searching out the debtor's assets.[230] Such a rule may have been workable before the Industrial Revolution, but it is clearly not realistic today in a largely urban society where people are free to move them- selves and their assets at will.

6.142 As a result of the impractical character of the common law rule, there has occurred a shift to the creditor of the onus to discover the debtor's assets. The Alberta Rules of Court now provide that the execution creditor, not the sheriff, can examine the debtor and others under oath as to the debtor's property.[231] The other de facto change which has occurred is the sheriff's increasing reluctance to do anything until the creditor not only instructs seizure but also tells the sheriff precisely what to seize and where it is to be found.[232]

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[228] Dunlop Report, para. 6.13.

[229] Dore and Kerr, at p. 348, report that each member of the staff of the Sheriff of Halifax "is given intensive training for a period of twelve or eighteen months with a heavy concentration on law," as well as frequent staff conferences which provide "continuing education on new developments." The education of sheriff officers in Scotland is also far longer and more rigorous than in Alberta. See Scot. Memo. 51, pp. 21-27.

[230] Dunlop Book, p. 384.

6.143 There are problems with the present system of information gathering about the debtor's assets. The examination in aid is not commonly used by execution creditors.[233] The reasons may be that the process is expensive and the sanctions for non-attendance are weak. Even if the debtor shows up and answers questions, the answers may not be dependable and are probably not going to be helpful. As a result, the creditor is reduced to making private inquiries about the debtor, and advising the sheriff on that basis.

6.144 The problem of getting accurate information about the debtor's assets has concerned other law reformers.[234] The radical critics discussed in chapter 5 proposed elaborate state screening systems of debtors.[235] They would create a judicial or administrative agency whose purpose would be to examine every debtor against whom enforcement proceedings are commenced in order to decide what, if any, remedies should be used to collect the debt.

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[231] Alberta Rules of Court, rr. 372-82. Quaere whether the sheriff could himself examine a person under rr. 374 and 375. We are not aware of the sheriff ever attempting to do so.

[232] See supra, paras. 2.84-2.85, 3.13-3.17. See also Dunlop Report, paras. 6.1-6.27.

[233] Supra, paras. 3.13-3.17.

[234] See Payne Committee, pp. 82-83; Ont. L.R.C. Report, vol. 1, pp. 155-56.

[235] Supra, para. 5.9(2). The exception may be the compulsory mediation scheme where the debtor is apparently under no obligation to reveal his assets.

6.145 We discussed earlier another aspect of the chapter 5 radical proposals, namely, the abolition of creditor control.[236] We rejected tentatively the idea that state control of the remedial process should replace creditor control. In our view, the chapter 5 proposals were costly and productive of delay. They involved an element of coercion which we found inappropriate, and they took from the creditor a responsibility which was rightly his or hers.

6.146 Insofar as the chapter 5 proposals involve an oral examination of every judgment debtor by a judicial or administrative officer, we now tentatively reject that idea for Alberta. If the examination were conducted by the sheriff, it would have the merit of getting the information directly to the officer responsible for enforcing the E.O. However the factors of cost and delay lead us to reject the scheme just as we rejected the abolition of creditor control. If the creditor thinks it important that the debtor be examined under oath, let the creditor do it and pay the tab.

6.147 We are aware that a judgment examination system presently operates in several Australian states.[237] The examinations serve a variety of purposes, involving an investigation of the existence and location of property of the debtor. The effectiveness and fairness of these processes have been questioned[238] and substantial reforms proposed.[239] We are not convinced that a judgment examination along Australian lines should be introduced into Alberta law.

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[236] Supra, paras. 6.35-6.61.

[237] See Kelly, pp. 3-7, 33-43; Aust. L.R.C., Report No. 6, p. 11; Law Reform Commission of West. Australia, Report on Enforcement of Judgment Debts (1977), pp. 1-15 (hereafter W.A.L.R.C.).

6.148 The Ontario Law Reform Commission, like this Institute, has rejected the enforcement office proposals of the Payne and Anderson Committees.[240] But the Ontario Commission was sufficiently concerned with the problem of information about the debtor's whereabouts and his assets to recommend substantial changes in Ontario law. Their proposals are worth careful consideration.[241]

6.149 The Ontario Commission begins by discussing four sources of information about the debtor available to the sheriff.[242] The information is needed to determine which county enforcement office is the appropriate base of operations and, more important to us, what assets the debtor has and where they can be found. The four sources are as follows:

(1) The enforcement register, that is, the sheriff's record of all enforcement activities in the bailiwick. The Commission proposes the eventual creation of a province-wide enforcement register.[243]

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[238] Kelly, loc. cit., but see W.A.L.R.C., pp. 1-15.

[239] Kelly, loc. cit.; Aust. L.R.C., Discussion Paper No. 6, discussed supra, paras. 5.20-5.26.

[240] Ont. L.R.C. Report, vol. 1, pp. 109-15.

[241] Ont. L.R.C. Report, vol. 1, pp. 134-36, 140-41, 155-69.

[242] Ont. L.R.C. Report, vol. 1, pp. 134-36.

[243] Ont. L.R.C. Report, vol. 1, p. 149.

(2) The creditor--The Commission recommends that "a creditor initiating active enforcement measures should be under a general obligation to provide information to the sheriff concerning matters relevant to the choice of appropriate enforcement office"[244] and "information concerning the debtor's property in respect of which the enforcement measure or measures are requested.[245]

(3) Other bailiwicks in which the creditor has sought to enforce the judgment against the debtor.[246]

(4) The debtor himself--Ontario, like Alberta, has an examination in aid process. The Commission proposes substantial changes to that process,[247] the most important of which is their recommendation that, before a creditor is entitled to demand oral examination of the debtor, he or she must make use of a judgment debtor questionnaire.[248]

> Where a creditor initiates active enforcement measures against a debtor, the enforcement office should be required, upon the instructions of the creditor:
>
> (1) to mail to the debtor a judgment debtor questionnaire. The questionnaire, in prescribed form, should seek information concerning the debtor's employment, income and assets, and any other information usually obtained on a judgment debtor examination; or, alternatively,
>
> (2) to serve the questionnaire personally on

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[244] Ont. L.R.C. Report, vol. 1, p. 135.

[245] Ont. L.R.C. Report, vol. 1, p. 141.

[246] Ont. L.R.C. Report, vol. 1, pp. 135-36.

[247] Ont. L.R.C. Report, vol. 1, pp. 155-69.

[248] Ont. L.R.C. Report, vol. 1, p. 159.

> the debtor, with an enforcement officer administering it (that is, requiring the debtor to complete it) upon service.[249]

The Ontario Commission goes on to develop rules about who can demand a written questionnaire and when, penalties for default by the debtor, and how the oral examination, if eventually held, is to be conducted. An interesting proposal is that the sheriff should be responsible for the conduct of all oral examinations, subject to the right of creditors to cross-examine the debtor or third party at the close of the sheriff's examination.[250]

6.150 The Institute wishes to comment on three aspects of the Ontario Commission's proposals.

(1) The Creditor's Duty to Provide Information.

6.151 The Ontario Commission's proposal is a sensible recognition of the fact that the creditor today is the person most likely to know something about the debtor. The creditor originally granted the credit and has, one assumes, tried to keep track of the delinquent account. The debtor can be examined in aid if that appears to be necessary. Moreover it is the creditor who will benefit from any money recovered from the debtor.

6.152 The Ontario Commission's recommendation envisages that the commencement of active enforcement by the sheriff will depend, among other things, on the receipt of sufficient information concerning the debtor's assets. The Commission proposes that a creditor, having obtained a writ of enforcement, should be provided with a form indicating the type of information that the sheriff would normally need prior to enforcing the judgment. If however the sheriff already has whatever information is reasonably necessary, he or she will have the duty to commence active enforcement measures forthwith.[251]

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[249] Ont. L.R.C. Report, vol. 1, p. 190.

[250] Ont. L.R.C. Report, vol. 1, pp. 162-63.

6.153 The Ontario proposal echoes similar recommendations in other reports[252] and seems reasonable to us. In large part, it will put in statutory form what is already the practice, but will have the virtue of making clear the respective duties of creditor and sheriff. We therefore tentatively recommend that, when a creditor instructs the sheriff to enforce an E.O., the creditor must provide the sheriff, to the best of his or her knowledge, with information concerning the debtor's property in respect of which the enforcement is requested.[253] This proposal must be read subject to our discussion below of the sheriff's duty to enforce.[254]

(2) The Written Judgment Debtor Questionnaire

6.154 The idea of a written debtor questionnaire was originally proposed as part of the enforcement office idea developed by the Anderson[255] and Payne Committees[256] and in the

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[251] Ont. L.R.C. Report, vol. 1, pp. 140-41.

[252] See Payne Committee, pp. 105-06; Anderson Committee, p. 22; S. Aust. L.R.C., p. 2.

[253] Special rules are necessary in the case of attachment of debts. They are discussed infra, in paras. 6.215-6.223.

[254] See infra, paras. 6.157-6.161 and Recommendation 38.

[255] Pp. 16, 23-24.

[256] Pp. 88-89, 120-29. See also N.S.W. Draft Proposal, pp. 48-51.

Australian Law Reform Commission's Discussion Paper No. 6.[257] The Ontario Commission rejects the enforcement office and does not propose anything like the Australian judgment hearing. However they have pulled out the idea of a written questionnaire and have added it as a process which can be requested by the creditor but which must precede an oral examination in aid.[258]

6.155 One is tempted to be doubtful about the likelihood of debtors filling in and returning written questionnaires about their assets when they are seriously delinquent in the payment of the debt itself.[259] The cost of the questionnaire, particularly if administered personally by an enforcement officer, is not negligible. On the other hand, the request by the creditor for a questionnaire would not, as we understand the Ontario proposal, prevent the creditor proceeding immediately with other enforcement methods, and it might elicit useful information. We have not reached a decision about the written questionnaire idea, but invite comment.

(3) The Oral Examination in Aid

6.156 The Ontario Commission's proposals as to the oral examination of the judgment debtor, not fully reproduced above, are intended to make the process a more effective information gathering device.[260] It is clear from our research that the

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[257] At pp. 17-18.

[258] Ont. L.R.C. Report, vol. 1, pp. 155-69. For a somewhat similar proposal limited to attachment of debts, see Scot. Memo. 49, pp. 37-39.

[259] See N.S.W. Draft Proposal, p. 48. Dore and Kerr, at pp. 280-81, reject the idea partly on this basis.

[260] Ont. L.R.C. Report, vol. 1, pp. 155-69.

Alberta examination in aid is not much used and is, we suspect, not particularly useful. However it is difficult to see how the process can be much improved. We have not developed views on the examination in aid, but request comment. We specifically ask for comment on the use of imprisonment for contempt as a sanction against debtors who fail to appear at examinations or to answer questions.[261]

l. The Seizure and Sale Process

(1) The Sheriff's Duty to Seize

6.157 In this section of the report, we want to talk about enforcement by seizure and sale of any property of the debtor, excluding debts. The attachment of debts creates peculiar problems which justify separate treatment.[262] The first question we want to consider is the sheriff's duty to seize.

6.158 We earlier said that, once the E.O. is filed with the sheriff, the creditor may at any time during the life of the E.O. instruct the sheriff to enforce it.[263] We thought that the creditor should be required to give the sheriff express written instructions to enforce the E.O.[264] We asked for advice on what other documents and promises of security should be required of the creditor at the time of the request to seize.[265] However, once all these documents and promises are given to the sheriff, we think that he or she should be under a statutory duty to commence active enforcement measures against the debtor.

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[261] See supra, para. 6.29.

[262] See infra, sect. n.

[263] Supra, para. 6.136.

[264] Supra, para. 6.108(i).

[265] Supra, pa~a. 6.136.

6.159 We also proposed above that, where a creditor instructs the sheriff to enforce an E.O., the creditor must provide the sheriff, to the best of his or her knowledge, with information concerning the debtor's property in respect of which the enforcement is requested.[266] This recommendation raises the problem of the creditor who either fails or refuses to supply information about the debtor. Is the sheriff required to seize, even in the absence of such information? Alternatively, is the sheriff entitled to wait until he or she is informed by the creditor, even when the sheriff has other knowledge, perhaps drawn from office files, as to the debtor's affairs?

6.160 The Ontario Commission considered this problem as follows:

> A creditor may not have access to all of the information described above, or for some reason he may delay in forwarding it to the enforcement office. However, the sheriff nonetheless may be provided with sufficient debtor information by means of the questionnaire and examinations. Where the sheriff has such information, and so long as the creditor has delivered to the enforcement office a writ of enforcement and has directed the sheriff to enforce his judgment, as proposed above, the sheriff should be under a statutory duty to commence active enforcement measures against the debtor. The sheriff, of course, would be under a general duty to act reasonably and in good faith in carrying out his responsibilities. As a result, it should be for him to determine, having regard to all the circumstances of the case, whether he has sufficient information to enable him, for example, to seize chattels, appoint a receiver or garnish debts or wages.[267]

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[266] Supra, para. 6.153.

[267] Ont. L.R.C. Report, vol. 1, p. 141.

6.161 We agree with the general thrust of the Ontario Commission's discussion. We therefore tentatively recommend that, where the sheriff has been given the documents and processes referred to in paragraph 6.158 and where he or she has sufficient information about the debtor to attempt enforcement, that the sheriff should be under a statutory duty to commence active enforcement measures against the debtor. This duty is really one example of the sheriff's broad responsibility to act reasonably and in good faith in carrying out his duties.

(2) Seizure

6.162 We earlier recommended that all of the assets and income of the debtor should be exigible or attachable by an unsecured creditor, unless there is some good reason for coming to the opposite result.[268] Thus the E.O. could be used to catch all property of the execution debtor, subject to exemptions and any other countervailing policies.

6.163 We also discussed[269] the common law governing seizure, and the extensive statutory overlay, especially the Seizures Act.[270] In our view, the law is sufficiently complex to justify some rethinking, especially in light of our recommendation that all property of the debtor should be exigible. It may be that special rules regarding seizure must be developed for different types of property, such as funds in court, for example. We invite comment on the law regarding seizure.

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[268] Supra, paras. 6.31-6.34.

[269] Supra, paras. 2.90-2.94.

[270] R.S.A. 1980, c. S-11.

(3) Service of E.O. on Debtor

6.164 When the sheriff is instructed to enforce an E.O. and has carried out the instructions by seizing property or attaching a debt, the sheriff should, in our view, be required to give or send to the judgment debtor a copy of the E.O. It is important that the debtor be informed that a judgment against him or her is being enforced by the judgment creditor.[271]

6.165 In chapter 3, we noted the large body of research suggesting that many debtors are not aware of their rights and are reluctant to seek advice.[272] The delivery of the E.O. provides an opportunity to try to correct that problem.

6.166 The Ontario Law Reform Commission has proposed that, where a creditor delivered a writ of enforcement (like our proposed E.O.) to the sheriff, the latter should send the debtor a Notice of Judgment.

> The Notice of Judgment should be a relatively simple document, in language comprehensible to laypersons. It should set out the court that issued the judgment being enforced, the style of cause, the date of judgment, the full name and address of the creditor, and the amount of the judgment, including costs, interest and other allowable amounts. The Notice also should indicate to the debtor that, subject to the statutory exemptions, all his assets are subject to enforcement measures, such as seizure, sale and garnishment.[273]

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[271] The Payne Committee concluded that judgment debtors were often not aware that judgment had been signed against them. See Payne Committee, p. 179.

[272] Supra, paras. 3.25-3.26. See also Trebilcock and Shulman, pp. 439-41, 448; Puckett, p. 193; Parker, pp. 183-88; National Consumer Council, pp. 89-90; Scot. R.R. #8, pp. 5, 47; Whitford, pp. 1064-66.

[273] Ont. L.R.C. Report, vol. 1, p. 144.

6.167 We agree with this idea and tentatively recommend that the Alberta sheriff should be required upon seizure or attachment to give or send to the debtor a Notice of Judgment along the lines of the Ontario proposal. In addition to the information proposed by the Ontario Law Reform Commission, we think that the Notice should include (1) a warning to the debtor concerning the gravity of the situation, and (2) a statement advising the debtor to seek the advice of a lawyer or the Family Financial Counselling Service.[274]

(4) The Effect of Seizure

6.168 Earlier in this report, we concluded that the E.O. should bind the debtor's personalty only upon seizure. It is necessary to look at the common law relating to seizure and to some modern developments before making our recommendations on the effect which seizure should have.

6.169 Halsbury notes that the consequence of seizure is that the goods are placed in the custody of the law for the benefit of those entitled by law: "The general property in the goods remains in the execution debtor, though what is called a special property in them vests in the sheriff, so that he can maintain actions for trespass or conversion against any person who takes them away. No property in the goods passes to the execution creditor."[275]

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[274] Similar recommendations are common. See Aust. L.R.C., Report No. 6, pp. 78-79; Aust. L.R.C., Discussion Paper No. 6, pp. 10-11, 17-18; Ont. L.R.C. Report, vol. 1, pp. 14-15.

[275] 17 Hals. (4th) Execution, para. 490, cited in Dunlop Book, p. 378.

6.170 Professor Dunlop states the effect of seizure as follows:

> The special property vested in the sheriff gives him the right to possession and control of the seized goods. On sale, he can convey to a purchaser whatever title the debtor had in the personalty. The execution debtor remains the owner of the seized goods until sale and can convey good title to a third person, but the sheriff is entitled to seize the goods in the hands of the purchaser, whether bona fide or not.[276]

6.171 There is however a problem in Alberta law about the sheriff's rights as against the bona fide purchaser. Section 4 of the Seizures Act[277] provides that the writ of execution from its delivery to a sheriff binds the goods of the judgment debtor, but an exception is created for goods purchased by any person in good faith, for valuable consideration and without notice of the writ. One might assume that the bona fide purchaser exception was intended to protect a purchaser only up to seizure and not afterwards. There is authority supporting the assumption,[278] but also authority tending in the opposite direction.[279]

6.172 The problem created by the above law is exacerbated by the common Alberta practice of leaving seized goods with the debtor or a member of the debtor's household on a bailee's undertaking. The debtor-bailee's responsibility is to keep the goods ready to turn over to the sheriff on request. However the debtor is tempted (and occasionally succumbs to the temptation) to sell or give away the goods to a person who may be ignorant of the seizure and of the debtor's financial troubles. The result is that the courts may be forced to make a choice between two innocent persons: the creditor acting through the sheriff and the bona fide transferee of seized goods.

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[276] Dunlop Book, p. 378.

[277] R.S.A. 1980, c. S-11.

[278] Lloyds and Scottish Finance Ltd. v. Modern Cars and Caravans (Kingston) Ltd., [1966] 1 Q.B. 764; Young v. Dencher, [1923] 1 D.L.R. 432 (Alta. C.A.); Traders Finance Corp. v. Stan Reynolds Auto Sales Ltd. (1954), 13 W.W.R. 425.

[279] McGillivray, "A Problem Arising out of Section 4 of the Seizures Act" (1940-42), 4 Alta. L.Q. 77; Sims, pp. 13G-17G.

6.173 The proper solution to the problem is not obvious. On the one hand, seizures are intended to secure property for sale so that the execution creditors can be paid. If bona fide purchasers take free and clear of the seizure (up to the sheriff's sale, one assumes), the result would be that a fraudulent debtor could defeat the rights of execution creditors, even if the goods had been taken into storage by the bailiff. On the other hand, the modern development of the practice of leaving the goods with the debtor as bailee is an invitation to the debtor to remove any evidence of the seizure and sell the goods to a genuinely innocent third person.

6.174 The matter is complicated by the advent of personal property security legislation.[280] Saskatchewan, alone among Canadian jurisdictions, has changed the old law regarding the binding effect of the writ to fit better with the PPSA. Section 2.2 of the Executions Act[281] provides:

> 2.2 Every writ of execution issued against goods on or after the coming into force of *The Personal Property Security Act*, binds, from the time of its delivery to the sheriff to be executed, all the goods of the judgment debtor within the province, and, if it is registered, takes priority over a security

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[280] See supra, para. 6.115.

[281] R.S.S. 1978, c. E-12.

> interest which has not been registered or which is registered after the writ of execution is registered, but does not take priority over:
>
> (a) a *bona fide* sale by the judgment debtor, accompanied by immediate delivery and an actual and continued change of possession of the goods sold, without actual knowledge to the purchaser that a writ is in the hands of the sheriff or that a seizure has been made;
>
> (b) the interests of a secured party who has taken possession of the goods before the writ of execution is registered;
>
> (c) the interests of a secured party who has taken a purchase-money security interest that is perfected pursuant to *The Personal Property Security Act* before or within 15 days after the debtor obtains possession of the goods, whether perfected before or after registration of the writ of execution.

The terms "purchase-money security interest" and "registered" are defined in section 2:

> (b) "purchase-money security interest" means:
>
> (i) a security interest that is taken or reserved by a seller, lessor or consignor of goods to secure payment of all or part of its sale or lease price; or
>
> (ii) a security interest that is taken by a person who gives value for the purpose of enabling the debtor to acquire rights in or to the goods, to the extent that the value is applied to acquire such rights.
>
> (c) "registered" means, in connection with a security interest or a writ

> of execution, registered in the Personal Property Registry in accordance with *The Personal Property Security Act* and the regulations made under that Act.

Other sections in the Act[282] provide for the mechanics of registration of the writ in the personal property registry.

6.175 At present, the Alberta government has tabled in the Legislative Assembly a Personal Property Security Act which has not passed into law. Our tentative proposals for reform must be divided into those which assume that the PPSA. does not become Alberta law, and those which make the opposite assumption.

6.176 As to the situation which should exist, assuming no PPSA., we invite comment, especially on the question of the rights of a bona fide purchaser of seized personalty after seizure and before sale.

6.177 Assuming, as seems likely, that the PPSA. does become Alberta law, we must start from our earlier decision to delay the binding effect of the E.O. to the point of actual seizure. As a result, we cannot accept the Saskatchewan legislation in its present form. However the idea that the E.O. system should be tied into the PPSA. registration scheme is appealing.

6.178 We therefore tentatively propose that, if a Personal Property Security Act is passed in Alberta, the law should be amended to provide as follows:

(i) Once the sheriff has seized personalty of the debtor, the sheriff or the creditor should file in the personal property security registry a notice of seizure of the personalty.

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[282] Ss. 31-31.2.

(ii) Upon seizure of personalty and registration of the notice of seizure in the personal property security registry, the E.O. would bind the seized personalty. We invite comment on the rights of a bona fide purchaser of the seized personalty after seizure and registration in the PPSA. registry of the notice of seizure, and before sale.

(5) The Sale of Seized Goods

6.179 Even if all the proposals in this report were to be accepted, the principal purpose for instructing seizure of goods would continue to be that the goods should be sold. The sale of seized goods raises a series of detailed questions of law and procedure which cannot be resolved in a preliminary report of this sort. Among the relevant issues are the following:

(a) The removal and sale application--does it serve a useful purpose? Should the discretion of the court be expanded, altered or made clearer?

(b) Rights of third parties to seized goods--are they adequately protected? What should be the liability of the sheriff and the creditor for wrongful seizure and other wrongful acts?

(c) Duties of sheriff during hiatus between seizure and sale--the right of the creditor to control the sheriff's conduct during this period.

(d) The sale itself--does the sale net a reasonable price for the goods sold, or are they usually sold at excessively low prices?[283] There is a substantial literature which says that sheriffs' sales usually produce far below a reasonable price for most types of goods,[284] but the sheriffs contacted by us advise that, on the average, the sheriff (or the auctioneer) will get as good a price for goods as the debtor would obtain at a private sale.[285] Assuming that an empirical study could establish that values at sheriffs' sales were excessively low, a variety of solutions are possible, including better retailing methods,[286] some form of pre-sale setting of a minimum sale price,[287] the creation of a right in the debtor to redeem seized goods[288] or legislation establishing a more secure title to be obtained by the purchaser at a sheriff's sale.[289] Straightening out the tangle of rules regarding the title obtained from the sheriff might be a useful exercise in any event.[290]

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[283] See our discussion supra, para. 2.103.

[284] Aust. L.R.C., Report No. 6, pp. 11, 78; Scot. Memo. 47, p. 12; Scot. Memo. 48, p. 3; Scot. R.R. No. 5, pp. 38-39; N.S.W. Draft Proposal, pp. 11, 13-14; Trebilcock and Shulman, pp. 441-42; Dore and Kerr, pp. 316-18; Whitford, p. 1060; LoPucki, pp. 316-20, 339; cf. Tassé Committee, pp. 52-53.

[285] Supra, para. 2.103.

[286] Dore and Kerr, p. 318; Trebilcock and Shulman, p. 460; cf. Ont. L.R.C. Report, vol. 2, pp. 119-36.

[287] E.g., the system of poinding in Scots law, as to which, see Scot. Memos. 47 and 48; Scot. R.R. #5 and 6. See the description of a similar American process in Dunlop Book, p. 397.

[288] Found in some American jurisdictions. See Dunlop Book, p. 397.

[289] N.S.W. Draft Proposal, pp. 13-14, 79-83; Ont. L.R.C. Report, vol. 2, pp. 259-86.

[290] Dunlop Book, pp. 397-404.

6.180 We invite comment on the law relating to the sale of seized goods. We are particularly interested in getting feedback on the question of the success of the present sheriff's sale in realizing the true value of seized goods, but opinions on all aspects of the sale process would be welcome.

(6) The Sheriff as Receiver

6.181 In most cases where property is seized by the sheriff, the only practical course of conduct will be to sell it. There are however situations where the better or the only course of action will be to hold the property and manage it or to realize on it in some way other than sale. In chapter 2,[281] we noted the examples of R.R.S.Ps. and conditional sales agreements where the sheriff might want to terminate the R.R.S.P. and take the money, or retain the conditional sales agreement and collect the payments. However the sheriff's power to carry out either of these activities is at best doubtful.[282]

6.182 At common law, the sheriff's duty was to seize and sell. He or she was responsible to protect the property until sale, and "protection" of a conditional vendor's interest probably included collecting payments made voluntarily by the conditional purchaser. However the sheriff probably could not compel the purchaser to make the payments to him.[283] Garnishment might be required, and that remedy would likely have to be brought by the creditor himself.[284]

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[281] Supra, paras. 2.87-2.89, also paras. 3.10-3.12.

[282] Supra, para. 2.88, note 135.

[283] See Re Smith, [1924] 3 D.L.R. 16, approved in Palmer v. Southwood, [1976] 3 W.W.R. 556 at 559-60 (Alta. C.A.).

6.183 These defects of the execution process were understood by the courts of equity who created a series of remedies to aid the frustrated execution creditor.[285] The most useful process was receivership, and it played a helpful role in the 18th and 19th centuries in enabling creditors to get at assets which execution failed to reach. However a series of English and Canadian decisions from the late 19th century to the present have so limited receivership and the other types of equitable execution as to make them virtually useless as remedies for unsecured creditors.[286]

6.184 We have little doubt in concluding that the sheriff's powers are too limited. The sheriff should in appropriate cases be able (i) to realize on property other than by sale and (ii) to retain and manage property for a reasonable time. The difficulty is to provide a system of rules which will protect the sheriff, the debtor and the creditors (who may disagree with each other as to the propriety of the proposed course of conduct).

6.185 One possibility would be to revive the old remedy of equitable execution and make it more useful by repealing some of the restrictions on the remedy imposed by the courts. It could be made clear that an order for equitable execution should be granted by the court wherever it is a more reasonable and convenient process than the enforcement order, or where the sheriff or receiver needs specific instructions and powers. We invite comment on this idea.

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[284] Garnishment is itself limited to debts due or accruing due to the debtor.

[285] See Dunlop Book, c. 9; Ont. L.R.C. Report, vol. 2, pp. 219-41.

[286] The leading case in Alberta is Fox v. Peterson Livestock Ltd. (1982), 17 Alta. L.R. (2d) 311 (C.A.).

6.186 The Ontario Commission has given careful thought to the problem but proposes a somewhat different solution. They say that the present remedy of equitable execution should be abolished. They would replace it with a new power in the sheriff to enforce a judgment debt by means of receivership.[297] Their proposal is complex and can be best understood by reproducing the basic recommendations from their report:

> 165. The present remedy of equitable execution should be abolished.
>
> 166. In its stead, a judgment debt should be enforceable by means of receivership, regardless of the nature of the debtor's property, and notwithstanding that some other method of enforcement is available, in accordance with the following Recommendations.
>
> 167. Subject to Recommendations 173 and 179-81, application for receivership should be made to the enforcement office and a court order for the appointment of a receiver no longer should be required.
>
> 168. A creditor who wishes to resort to the receivership remedy should bear the onus for so instructing the enforcement office, and where the sheriff specifically is directed to proceed in this manner, he should be bound to accede to the creditor's direction, unless he knows or has reasonable grounds for believing that in so doing he would breach the provisions of a statute or regulation or otherwise commit an illegality.
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> 169. Where a judgment creditor, rather than expressly selecting receivership, instructs the enforcement office to use any and all enforcement measures necessary to enforce the judgment, or

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[297] Ont. L.R.C. Report, vol. 2, pp. 219-41.

where the enforcement office is in receipt of conflicting or inconsistent instructions regarding the employment of receivership, the enforcement office should be free to select receivership as the most appropriate enforcement measure.

170. In determining whether receivership is the most appropriate enforcement measure in a given case, the enforcement office should be under a duty to act reasonably and in good faith and should have regard to all the circumstances of the case, including the amount that is likely to be collected by using receivership and the probable costs of this remedy, as compared to other enforcement methods, the nature of the debtor's assets, and so on.

171. Unless the court otherwise orders, the enforcement office, in the person of the sheriff, should act as receiver.

172. The enforcement office should be empowered to retain experts and agents to assist it in the performance of its receivership function.

173. Upon the application of a judgment creditor, the judgment debtor or the enforcement office itself, the court should be empowered to appoint someone other than the enforcement office to act as receiver, and to authorize such receiver to seek the advice or assistance of experts and others.

174. The enforcement office, acting as receiver, should be empowered to sell any personal or real property realized by way of receivership in the same manner, and subject to the same rights and liabilities, recommended by the Commission for the sale of a judgment debtor's personal property and real property acquired under a writ of enforcement.

175. Where the court, under Recommendation 173, has appointed someone other than the enforcement office as receiver, the court should be empowered to specify the sale powers, if any, of the receiver.

176. Subject to the following Recommendation, where the judgment creditors of a

judgment debtor all agree to direct the enforcement office, acting as receiver, to manage some particular property of the debtor, the enforcement office should be required to follow the direction.

177. Before employing the management power referred to in Recommendation 176, the enforcement office should be required to notify the judgment debtor of the instructions of the judgment creditors and to advise the judgment debtor of his right to apply to the court to challenge resort to the management power.

178. Where all the judgment creditors of a particular judgment debtor object to the enforcement office acting as receiver-manager, the enforcement office should not be entitled to manage or administer the debtor's property.

179. Where the enforcement office is in receipt of conflicting or inconsistent instructions regarding use of the proposed management power, it should have recourse to this power only after the court has authorized its use.

180. Similarly, where the enforcement office has received from a judgment creditor only general instructions to enforce his judgment against the debtor in the most appropriate manner in all the circumstances, the enforcement office should not be able to embark on a course of administration of the debtor's property without prior court approval.

181. Where someone other than the enforcement office has been appointed as receiver pursuant to Recommendation 173, the court making the appointment should be empowered to authorize the receiver to act as a receiver-manager. If the need to manage or administer the property received arises subsequent to the receiver's appointment, and the order making the appointment fails to authorize such a power, the receiver should be able to apply to the court, upon notice to all concerned, for such authorization.

182. The delivery of a notice of receivership to the person in possession of the property in question or to the person

> indebted, or to the person who may become indebted, to the judgment debtor should be sufficient to bind the property or debt and should operate as a restraining order against the transfer, disposition, conveyance or assignment of the property or debt.
>
> 183. A notice of receivership also should be delivered to the judgment debtor.[298]

6.187 The Institute is interested in the Ontario proposal of a sheriff-receiver as a useful addition to our law. It would expand the limited powers of the sheriff and give him a flexibility which he now lacks. Rather than recommending the Ontario scheme or a version of it at present, we think it useful to seek comments on their recommendations. Without seeking to limit the discussion, the following thoughts occur to us:

(1) Is it desirable to expand the sheriff's role from that of agent for sale to something approaching a full-scale receiver-manager or trustee in bankruptcy? Can this step be taken without a substantial change in the training of the present sheriffs and their officers?[299] Can we forsee a specialization of functions in which the sheriffs and bailiffs perform roughly their present functions, while a special department of the Court Services Division of the Department of the Attorney General does the receivership work for the whole province?

(2) The Ontario proposal contemplates that the sheriff should be entitled to act as receiver only when asked to do so by a creditor. (Recs. 167-169.) Is there any case where the sheriff should be entitled to act as a receiver on his or her own

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[298] Ont. L.R.C. Report, vol. 2, pp. 311-12.

[299] See supra, paras. 6.139-6.140.

motion?

(3) The Ontario scheme draws a distinction between the powers of a receiver to sell and to manage the property. The sheriff can proceed to sell without court order, but where the sheriff is asked to manage the property, all creditors must so direct or a court order must be obtained. The court cannot make a management order where all creditors object to it. (Recs. 174, 176, 178-80.) Two questions occur to us. First, are there any non-sale powers, such as collapsing an R.R.S.P. or obtaining the cash value of an insurance policy, which could be given to the sheriff without the need for a court order? Secondly, are there any situations where the sheriff's power to sell should be exercisable only on court order, or should be subject to court supervision? Assistance might be gained from a review of the law governing trustees in bankruptcy and receivers.

(4) The Ontario scheme contemplates that a creditor, the debtor or the sheriff may apply to court for an order that someone other than the sheriff, for example, a private receiver or trustee, be empowered to act as receiver of a particular asset. (Rec. 173.) Special rules apply to such a private receiver. (Recs. 175, 181.) Is this departure from the state monopoly of the enforcement process a desirable one? If so, are the rules sufficiently flexible to enable a private receiver to do the desired job? Here again, the experience of trustees and receivers in other contexts will be useful.

m. Execution Against Land

(1) Differences Between Land and Personalty

6.188 The Ontario Commission has noted[300] that the significant difference between execution against personalty and execution against land lies in the binding effect of the writ. As to tangible goods and chattels,[301] the writ binds at the time when it is delivered to the sheriff's office, but there is an exception, available at least to the date of seizure,[302] for a bona fide purchaser for value without notice.[303]

6.189 In the case of most interests in land, however, the process and its consequences are different.

> The procedure is that the execution creditor files his writ with the sheriff to whom it is directed and the sheriff certifies a copy of the writ for him. The creditor then takes the certified copy of the writ to be filed at the Alberta land titles office or offices for the registration district or districts where he thinks that the execution debtor has land. The writ is almost always filed in the general register against the name of the execution debtor.
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> . . . .
>
> Subsection 122(2) [of the Land Titles Act] says that the writ filed in the land titles office binds "all legal and equitable interests of the execution debtor in any land there or thereafter registered in his name" including his interest as an unpaid vendor of land. Despite the sweeping wording, there are some interests in land ... which may not be caught by the writ.

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[300] Ont. L.R.C. Report, vol. 3, p. 1.

[301] See *supra*, paras. 6.109-6.120.

[302] *Supra*, paras. 6.168-6.178.

[303] Seizures Act, R.S.A. 1980, c. S-11, s. 4.

. . . .

> As to those interests in land included in the scope of section 122, they are said to be "bound by the execution," with the result that the execution debtor cannot sell or mortgage his land except subject to the writ.[304]

6.190 The Ontario Commission points out the crucial difference between the effect of a writ against land and its effect against personalty:

> Unlike the situation in respect of personal property, where generally a writ does not prejudice the title of a bona fide transferee for value and without notice of the writ, a writ filed in a sheriff's office or in a land titles office binds the land of the debtor as against all transferees. Consequently, a debtor cannot sell or mortgage his land free from the lien represented by the writ. The execution creditor therefore has the luxury of sitting back and awaiting an attempted disposition of the land.[305]

Apart from the reference to filing a writ in a sheriff's office (which would not bind most land in Alberta), the above passage accurately states the different effect of a writ as to personalty and land in this jurisdiction.

6.191 There are some interests in land which do not fit the above pattern. The Seizures Act provides for the seizure and sale of "any leasehold interest in land and any other chattels real that are the property of the debtor"[306] and "any registered mortgage of or encumbrance on land ... of which the debtor is the owner."[307] The presence of these provisions in the Seizures Act, rather than the Land Titles Act, is perplexing. It may mean that the filing of a writ in the sheriff's office is enough to bind these interests in land, even if a certified copy is not filed in the land titles office. If the creditor wishes to instruct sale of such interests in land, filing at the land titles office will be required,[308] but the binding effect may be accomplished without that step.

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[304] Supra, paras. 2.105-2.107. References are to the Land Titles Act, R.S.A. 1980, c. L-5.

[305] Ont. L.R.C. Report, vol. 3, p. 1.

[306] Seizures Act, R.S.A. 1980, c. S-11, s. 5(1).

6.192 Because of the ease by which land can be bound, even against bona fide purchasers, the filing of writs in the land titles offices has proved to be popular.[309] Almost all creditors simply file their writs at the land titles office and then wait for the judgment debtor to attempt to sell or mortgage land at which time the writ-holders will probably be paid. Seizure and sale of an interest in land is a lengthy and confusing process which is rarely attempted, much less completed.[310]

(2) Exigibility of Interests in Land

6.193 We earlier proposed that all property of the debtor should be exigible by his or her unsecured creditors,[311] and we see no reason to exempt land from that policy. We therefore tentatively recommend that all interests in land of the judgment debtor should be exigible pursuant to an E.O. unless there is some good reason for coming to a different result. This proposal would effect two changes in the present law: (1) it would be a clear statement that the common law refusal to permit execution against land has been rejected,[312] and (2) it would be wide enough to catch all interests in land, without the gaps in coverage which are a feature of the present system.[313] We equally see no reason why unregistered interests in land should not be available to execution,[314] and we so recommend.

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[307] Seizures Act, R.S.A. 1980, c. S-11, s. 8(1).

[308] Seizures Act, R.S.A. 1980, s. S-11, s. 15(1)(b).

[309] Supra, paras. 2.110-2.114; Ramsay Report, pp. 196-97.

[310] For a description, see annotation to Westhill Leasing Corp. Ltd. v. Rideout (1983), 25 Alta. L.R. (2d) 229.

[311] Supra, paras. 6.31-6.32.

6.194 The principal "good reason" why certain land should not be exigible would be that it was necessary for the survival of the debtor or for his or her work. In 1978, the Institute published its Exemptions Working Paper in which it made proposals regarding exemptions of land. We will review these recommendations before making our final report, but would appreciate comment on the 1978 Working Paper and on land exemptions generally.[315]

(3) How Land Should be Bound

6.195 At present, most land is bound by the filing of a writ of execution in a land titles office. This seems unavoidable in a Torrens system, and we tentatively recommend that the same rule should apply to E.Os, namely, that the binding effect of an

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[312] Cf. Rout, "Execution Against Land in Alberta," LL. M. thesis (Univ. of Alta.), pp. 32-55.

[313] Supra, para. 2.106. See Ont. L.R.C. Report, vol. 3, pp. 5-14, 23-60.

[314] Unregistered interests in land are not bound by a writ of execution filed in the land titles office. See Land Titles Act, R.S.A. 1980, c. L-5, s. 122(2)(a). There is some authority that a caveat can be used to affect such land. See Dunlop Book, pp. 184-85.

[315] See also Aust. L.R.C., Discussion Paper No. 6, pp. 24-26.

E.O. against land should occur when a certified copy of the E.O. is filed at a land titles office. We defer to paragraphs 6.197-6.203 the issue of the continued existence of a general register for executions.

6.196 There remains the question of those interests in or related to realty which are now dealt with in the Seizures Act, namely, leaseholds and mortgagees' interests. As to the latter, we have no doubt that they should be regarded as interests in land and should be proceeded against only by the process by which other interests in land are attached. As to leasehold interests, we see the problem as more complex. At common law, leases were exigible by fieri facias as personalty,[316] and the Ontario Commission thought it best to preserve that policy.[317] We invite comment.

(4) The General Register

6.197 At present, almost all writs of execution are filed in the general register against the name of the registered debtor. Alberta law does not require the creditor to file the writ against specific parcels of land; filing in the general register will catch all land in the land registration district in which the debtor has or later acquires an exigible interest.

6.198 To the execution creditor, this state of the law is inconvenient but also beneficial. The law is inconvenient in the sense that a writ filed in the land registration district for Northern Alberta will catch only land holdings in that district but will not extend to land holdings in the southern Alberta district. This inconvenience is easily overcome by filing a copy of the writ in both registration districts, although this step is rarely taken.[318]

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[316] Dunlop Book, p. 126.

[317] Ont. L.R.C. Report, vol. 3, p. 10.

6.199 This minor inconvenience is overshadowed by the major advantage that the creditor need not know what land the debtor owns, if any. The reason is that the writ filed in the general register binds "all legal and equitable interests of the execution debtor in any land there or thereafter registered in his name".[319] The effect of such a filing is spelled out in section 122(2)(b) of the Land Titles Act:[320]

> (2) On and after the receipt by the Registrar of the copy of the writ,
>
> . . . .
>
> (b) no certificate of title shall be granted and no transfer, mortgage, encumbrance, lease or other instrument executed by the execution debtor of the land is effectual except subject to the rights of the execution creditor under the writ while it is legally in force.

6.200 If the creditor were required to register a writ against specific parcels of land held by the execution debtor, the remedy would be much more difficult to use. Examinations in aid are not commonly employed and are not guaranteed to discover land-holdings. Moreover the Alberta land titles system does not have an index by name of owner. The creditor would be in some difficulty to discover specific land-holdings and would often be unable to use what is now a popular and productive remedy.

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[318] See Dunlop Report, paras. 7.10-7.12.

[319] Land Titles Act, R.S.A. 1980, c. L-5, s. 122(2)(a).

[320] R.S.A. 1980, c. L-5.

6.201 While the present system is on the whole beneficial to creditors, it creates substantial problems for others. When a person wishes to sell or mortgage land, the purchaser or mortgagee will not want the new title to issue subject to a writ of execution. If any writs show up in a search of the general register, the owner of land will be required either to discharge them or to demonstrate that the debtor referred to in the writ is a different person from the prospective vendor or mortgagor. This may be a problem where the names are common ones, e.g., Smith or Jones. The result is that the cost of conveyancing is increased and the process complicated by the way in which writs presently bind land.

6.202 As a result of these problems to the conveyancing process, three law reform commissions have proposed that, in the long run, the general register should be abolished and that creditors should be required to file their writs against specific parcels of land.[321] In one jurisdiction, this long term proposal has become law.[322] The three commissions either assumed the existence of an index of land holdings by name or recommended that the abolition of the general register should await the creation of such an index. In the short term, two of the commissions[323] proposed changes to lessen the impact of the writ filed in the land titles or sheriff's office on the land conveyancing system. The Ontario report used the conveyancers' problems as a reason not to make the scope of a writ province-wide as to land,[324] although they had earlier recommended that a writ have a province-wide effect as to personalty.[325]

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[321] Law Reform Commission of B.C., The Enforcement of Judgments: Execution Against Land (Working Paper No. 22, 1976); Law Reform Commission of B.C., Report on Execution Against Land (1978); Manitoba Law Reform Commission, Report on the General Register (1980); Ont. L.R.C. Report, vol. 3, pp. 73-132.

[322] See now Court Order Enforcement Act, R.S.B.C. 1979, c. 75, ss. 74-77; Land Title Act, R.S.B.C. 1979, c. 219, ss. 205-09.

6.203 We find this issue to be one of considerable difficulty. We are loath to detract seriously from the effectiveness of the writ filed in the land titles office. However we understand and sympathize with the problems of vendors or mortgagors and their lawyers who are genuine outsiders dragged into a conflict between creditor and debtor. We will not recommend a course of action in this report but would seek advice on the following points, as well as any others which are seen to be relevant:

(i) Should execution creditors be required, in order to bind the land of the debtor, to file their E.Os. against the specific parcel? In other words, should the general register be abolished, at least for E.Os.?

(ii) If the answer to Question (i) is yes, should that reform be delayed until the creation of an index of land holdings in Alberta by name of owner?

(iii) If the answer to Question (ii) is yes, what changes should be made in the interim to lighten the burden of the E.O. on the conveyancing process?

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[323] Manitoba and Ontario.

[324] Ont. L.R.C. Report, vol. 3, pp. 95-98.

[325] Ont. L.R.C. Report, vol. 2, pp. 15-18.

(iv) What decision should be made as to the geographic scope of the E.O.'s binding effect against land? Should the E.O. 's binding effect be limited to a specific judicial district or extended to the boundaries of a land registration district? Should the E.O. bind land throughout the proince?

(5) Seizure and Sale

6.204 The actual seizure and sale of land is a comparatively unimportant issue, largely because the process is not often initiated and almost never completed. One reason is that the details of execution against land are complex and uncertain.[326] While the process is never likely to be commonly used, we think that it could be simpler and clearer than it now is. If there is a divergence between seizure and sale of land generally and execution against leaseholds and mortgagees' interests (because of their mention in the Seizures Act[327]), we think that, as to mortgagees' interests, the process should be the same as that used against land generally. As to the treatment of leases, we invite comment.

6.205 The Seizures Act[328] presently provides as follows:

> 15(1) No sale of land shall, unless the Court otherwise orders, be had under a writ of execution

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[326] For a description, see annotation to Westhill Leasing Corp. Ltd. v. Rideout (1983), 25 Alta. L.R. (2d) 229.

[327] Supra, paras. 6.191, 6.196.

[328] R.S.A. 1980, c. S-11.

> (a) until after a return nulla bona in whole or in part, and
>
> (b) until after the expiration of one year from the date of the receipt by the Registrar of the appropriate land titles office of the copy of the writ of execution.

Restrictions on execution against land, like those in the Seizures Act, are common in Canadian statutes; British Columbia is the only province which gives the judgment creditor discretion to proceed first and without limitation against the debtor's land.[329] The British Columbia Law Reform Commission has recently proposed a new limitation to the sale of land under execution, namely, that seized land should not be offered for sale for six months, unless otherwise ordered, and that the debtor should be able, in effect, to "redeem" the land during that period.[330] We invite comment on the limitations, if any, which should apply to execution against land, including the present subsection 15(1) of the Seizures Act[331] and the idea of a "redemption" period suggested by the British Columbia Law Reform Commission.

(6) Discharge of Writs in Land Titles Offices

6.206 When a debtor pays a judgment or strikes a compromise in which part payment will be accepted as full satisfaction, the practice varies as to the way that this occurrence is recorded. Some creditors file nothing in the court offices but simply permit their action to lapse. Others file a discontinuance or a satisfaction in the clerk's office or write a letter to the sheriff instructing him to cease enforcement. Some do both.[332]

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[329] Re Schiava's Judgment (1960), 32 W.W.R. 239 (B.C.S.C.); Dunlop Book, pp. 174-75, but see Court Order Enforcement Act, R.S.B.C. 1979, c. 75, s. 88(1).

[330] Law Reform Commission of B.C., Report on Execution Against Land (1978), pp. 19-21. The Ontario Commission considered but rejected the idea. See L.R.C. Ont. Report, vol. 3, pp. 60-62, but cf. pp. 19-21.

[331] See Ont. L.R.C. Report, vol. 3, pp. 14-23.

6.207 When a creditor communicates with the clerk or the sheriff that the action is discontinued, one would assume that this occurrence would be communicated to those land titles offices where writs are filed. However our research demonstrated that such communication was by no means automatic.[333] We wanted to find out whether the total number of writs shown as discharged in the three sheriffs' offices studied was significantly different from the totals of discharged writs in the land titles offices.

> It was found that only 214 writs filed both in the sheriffs' offices and land titles offices were noted as discharged in the latter offices, while in the sheriffs' offices, 294 of the writs filed were noted as discharged. Thus only 73% of the files with writs recorded as discharged in the sheriffs' offices were also recorded as discharged in the land titles system. Another way of stating these results is that 27% of the writs filed against debtors' land in the land titles offices had actually been discharged according to the records in the sheriffs' offices.[334]

6.208 The whole question of discontinuance of enforcement proceedings is one which needs thought. One might require every judgment creditor who receives full or part satisfaction of the debt to communicate that fact to the sheriff's office, although it is not obvious what the sanction would be.[335] One might require the judgment creditor to communicate the fact of satisfaction to all relevant offices (clerk, sheriff, land titles) where documents have been filed. We will consider these questions in our final report, and invite comment now. In the interim, we tentatively recommend that, when a sheriff's office receives a letter or document to the effect that a judgment debt has been discharged, that fact should in all cases be communicated to both land titles offices which should then withdraw any E.O. filed in support of that debt from the general register and place it in the register of discharged E.Os.

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[332] Supra, paras. 2.174-2.177.

[333] Supra, paras. 2.178-2.182.

[334] Supra, para. 2.181.

6.209 We appreciate that the implementation of this recommendation will require time and effort, but we think that it can be done, particularly as one of the two land titles offices has in the past been able to get this information by sending its own staff to the closest sheriff's office to search for satisfactions or discharges.[336] If an E.O. has been satisfied, it should not linger in the general register as a trap for future transactions involving the debtor's land or the land of other people with similar names. The trouble caused by such E.Os. justifies the cost occasioned by the need to communicate the information between sheriff and land titles registrar.

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[335] Ss. 28 and 29 of the Execution Creditors Act, R.S.A. 1980, c. E-14 will be effective only if the creditor wants his writ to stay in force, which is unlikely if he has been paid.

[336] Supra, para. 2.179.

n. Attachment of Debts

(1) Attachability

6.210 At common law, debts could not be seized pursuant to the writ of _fi_. _fa_., and it was not until 1854 that an attachment of debts remedy was made generally available to judgment creditors.[337] In Alberta today, the principal legislation which enables debts to be attached is Rules 470-484 of the Alberta Rules of Court.[338] Rule 471(1) provides that service of a garnishee summons binds debts "due or accruing due from the garnishee to the defendant or judgment debtor."[339]

6.211 Attachment (or garnishment) of debts was not created as a mere expansion of the scope of _fi_. _fa_. but as an entirely separate remedy, and both execution and garnishment are separate processes in Alberta today. The result is to create a serious gap in the coverage of Alberta creditors' remedies. The problem may be illustrated by an example.

6.212 Assume the case of a debt which is neither due nor accruing due. It is a debt, no doubt, but subject to a condition which takes it outside the formula "due or accruing due."[340] Such a debt clearly cannot be attached. It would also appear that it cannot be seized pursuant to a writ of execution. It is true that section 5 of the Seizures Act[341] speaks of the sheriff having the right to seize and sell any interest of the debtor in "any goods or other personal property." While it may be that these words should be interpreted as widely as possible,[342] it is doubtful that they stretch to debts which are not referred to in section 5 but are the subject matter of the garnishee summons remedy created by the Rules of Court. If this is the correct result, then equitable execution would also not be available.[343]

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[337] _Supra_, para. 2.118.

[338] For other legislation permitting attachment of debts, see _supra_, para. 2.119. Our proposals in this report refer only to the Alberta Rules of Court.

[339] See also r. 470(3)(b). See _supra_, paras. 2.131-2.134.

[340] There are numerous examples. See Dunlop Book, pp. 236-49; Ont. L.R.C. Report, vol. 2, pp. 138-42.

6.213 We earlier made two recommendations which were intended to solve this problem. At paragraph 6.32, we proposed that all assets and income of the debtor should be exigible or attachable, unless there is some good reason for coming to a different result. We referred to the joint bank account and the term deposit as cases where contervailing considerations might apply, and asked for comments.[344] We referred in a footnote to Northern Ireland legislation which enabled the creditor seeking to attach a bank account to ignore certain conditions on payment, such as the requirement that a deposit book be produced before money can be withdrawn.[345] Later we proposed that all existing remedies (including attachment of debts) be abolished and replaced by one new remedy (the E.O.) which would be designed to catch all real and personal property of the judgment debtor, including debts owing to him or her.

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[341] R.S.A. 1980, c. S-11.

[342] See Dunlop Book, p. 161.

[343] Fox v. Peterson Livestock Ltd. (1982), 17 Alta. L.R. (2d) 311 (Alta. C.A.).

[344] Supra, para. 6.34. On the joint bank account, see Ont. L.R.C. Report, vol. 2, pp. 142-46.

[345] Supra, para. 6.34, note 40. The Ontario Law Reform Commission proposed that a creditor should be able to attach conditional, contingent and future debts, and debts owed by the Crown. See Ont. L.R.C. Report, vol. 2, pp. 138-42, 146-50.

6.214 The effect of these proposals, taken together, should be to close the gap discussed above and to make all property of any sort available to the judgment creditor. It may be that special legislative provisions will be needed for certain debts, such as bank accounts. Some assets which combine property and debt obligations might be better handled by the sheriff as a receiver, as proposed above.[346] However the result should be that all property of the debtor is exigible or attachable, absent some contervailing policy.[347]

(2) A Separate Procedure for Debts

6.215 Theoretically, the proposals referred to in the last paragraph are all that need be said about the attachment of debts. If the old garnishee process is replaced by the E.O., then the process for collecting debts would become the same as the process for seizing goods. The E.O. would be delivered to the sheriff with a reasonable amount of information regarding a particular debt[348] and instructions to seize the debt.[349] The sheriff would then seize, pursuant to the statutory duty to do so.[350]

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[346] Supra, paras. 6.181-6.187.

[347] See Ont. L.R.C. Report, vol. 2, pp. 137-50; Law Reform Commission of B.C., Report on Attachment of Debts Act (1978).

[348] Supra, paras. 6.149-6.153.

[349] Supra, para. 6.108.

[350] Supra, paras. 6.157-6.161.

6.216 The idea of a sheriff seizing a debt may seem strange, but it is not unknown in other Canadian jurisdictions. Section 19(2) of the Ontario Execution Act[351] empowers the sheriff acting pursuant to a writ of execution "to seize any book debts ... of the execution debtor." The Ontario Court of Appeal has held that debts owing to the execution debtor are thus liable to two processes: execution under the quoted section and garnishment under the Ontario attachment of debts legislation.[352]

6.217 Another and more thoroughgoing example is Rule 53 of the Nova Scotia Civil Procedure Rules which creates an all-encompassing execution order along the lines of our proposed E.O. Rule 53.02 provides that an execution order shall direct any sheriff:

> to seize, accept as a receiver, hold and sell at public auction any property in which the judgment debtor has an interest, including any debt, rent, legacy, share, bond, debenture or other security, currency, wages, or other demand, due or accruing due at any time while the order is valid, whether in the possession or custody of the judgment debtor or other person and not exempt by law from seizure, as will satisfy in whole or in part the amount of the claim.

Rule 53 also contains a series of provisions governing payment of wages to a sheriff.[353]

6.218 Execution orders granted pursuant to Rule 53 are primarily used to attach wages, the seizure of chattels being a rare occurrence.[354] Loane Skene, in a paper written for the Nova Scotia Law Reform Advisory Commission, has summarized the procedure followed in the Halifax sheriff's office in enforcing an execution order:

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[351] R.S.O. 1980, c. 146.

[352] Re A.G.Ont. and Royal Bank, [1970] 2 O. R. 467 (C.A.).

[353] R. 53.05.

> Immediately on receipt, the application [for an execution order] is entered in a book.... It is then handed to the deputy sheriff in charge of the execution department for a pre-levy investigation. This is generally done by telephone, the deputy sheriff checking to see that the debtor is in fact at the address and place of employment given in the execution order; he may also check the court records to ensure that the debtor is named in the same way or at the same address as in the originating notice.... The file is then referred to a field deputy sheriff, who serves the execution order on the defendant, his employer, or a third person; the deputy sheriff decides who should be served with the execution order. The field deputy sheriff will approach the defendant and, if it appears that he may have some assets, he will ask him to pay voluntarily the 15 per cent of his wages that could be garnisheed by the order. This means that the debtor has the option to pay the debt on an installment basis, without his employer being informed of the order. The sheriff has found that this approach generally works quite well, particularly if the debtor has only one or two judgments against him. If the judgment is against a small business-man or self-employed person, the sheriff may seize the whole of his bank account or intercept any contract monies owing to him....
>
> Payments made by the debtor under an execution order are made to the sheriff's office. If the sheriff is collecting on only one execution in respect of a debtor, he will disburse the funds to the judgment creditor as soon as he receives them. If he is collecting on more than one execution order, he will hold the monies received from the debtor for one month after the first judgment debt in his hands has been paid, and then

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[354] Loane Skene, The Collection Act: A Study Paper (Nova Scotia Law Reform Advisory Commission, 1974), p. 74 (hereafter Skene).

> remit the monies to that judgment creditor; he will then collect the second judgment debt and remit those monies to the second judgment creditor, etc. In his view, it would involve an enormous amount of paper work and a vast increase in his staff, to distribute monies to creditors on a pro rata basis and he finds that most creditors or creditors' lawyers do not insist on pro rata distribution.[355]

The Nova Scotia procedure seems foreign to us, primarily because the application for an execution order is made to the sheriff, not the clerk, and because the sheriff must actually seize the debt, instead of the creditor being responsible for serving the garnishee summons.[356]

6.219 It is interesting to compare the Nova Scotia Rules with the proposals of the Ontario Law Reform Commission.[357] The Commission, like us, proposed that the old remedies be abolished and replaced by an all-encompassing E.O. However the Commission went on to provide that, if an execution creditor wishes a debt to be attached, it is not enough to deliver the E.O. to the sheriff. The creditor must also request garnishment of a specific debt and give the sheriff an affidavit not unlike that required by our present Rule 470. Once the request for garnishment and the proper affidavit is received by the enforcement office, the office is required to issue a notice of garnishment to effect garnishment of the debt or debts referred to in the creditor's request. As in the Alberta Rules, the issue of a notice of garnishment is compulsory, once the appropriate documentation is filed. The notice is then served on the garnishee, apparently by the creditor.

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[355] Skene, pp. 73-75. Skene's report was written in 1974, but the practice remains the same today. See Parker, p. 272.

[356] Cf. our procedure described supra, paras. 2.117-2.123.

[357] Ont. L.R.C. Report, vol. 2, pp. 200-08.

6.220 In both the Nova Scotia Rules and the Ontario proposals, the request that a debt be attached goes to the sheriff rather than the clerk. However the proposals differ as to the extent to which the sheriff can intervene in the garnishment process. In Nova Scotia, the sheriff must actually go out and seize the debt, not an important change if he or she acts promptly. Under the Ontario scheme, however, the sheriff acts only as a clerk in accepting and checking the request for garnishment and the affidavit. Once these documents are filed correctly, the sheriff must issue the notice of garnishment. Thereafter the sheriff drops out of the picture except to collect the garnishee's payment or to receive any dispute.[358]

6.221 The question is whether either of these two proposals would be appropriate for Alberta, or whether some other approach should be taken. Our tentative view is to agree with Nova Scotia and Ontario that the garnishment process should take place in the sheriff's office rather than the awkward division between clerk and sheriff that exists in Alberta at present. We are not sure of the extent to which the sheriff should be active in the attachment of debts. The Ontario approach leaves the garnishment process firmly in the hands of the creditor, but it does resurrect a difference between garnishment and execution which may cause problems.

6.222 We tentatively recommend that the creditor's request for attachment of debts should be directed to the sheriff instead of the clerk of the court, and that the subsequent performance of the request should involve only the sheriff's office. We invite comment on the process of attachment of debts, including the extent of the sheriff's active participation in the process.

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[358] Ont. L.R.C. Report, vol. 2, pp. 208-10.

6.223 We earlier invited comment on the seizure and sale process, including the removal and sale application.[359] At present, the removal and sale application results in a fairly extensive degree of judicial supervision of the execution process, but there is no analogous supervision of attachment of debts.[360] It would be possible to create for garnishment the alternative of the removal and sale process. When notice of the garnishee was served on the judgment debtor, it could be accompanied by a notice of objection to garnishment, to be signed by the debtor, and an envelope addressed to the sheriff. After the debt was paid into the sheriff's office but before payment out, the creditor would be required to apply for an order for payment out. The Institute invites comment on the idea of a process like the removal and sale application but applicable to the attachment of debts.

(3) Attachment of the Debtor's Income--Abolition or Retention

6.224 Our 1978 working paper on exemptions raised the threshold issue whether wage garnishment should be permitted at all in Alberta. We stated the arguments for and against wage garnishment in terms which still seem relevant.[361] We propose to review those arguments and then make our tentative recommendation.

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[359] Supra, para. 6.179.

[360] There is a handful of cases in which the court has exercised control over an unfair or abusive use of the garnishment process. See Dunlop Book, pp. 253-55.

[361] Exemptions Working Paper, pp. 45-51.

6.225 The arguments for retention of wage garnishment, set out in our 1978 paper, were the following:

(1) Wage garnishment has a number of advantages over the other principal creditors' remedy, execution and sale of the debtor's goods. This latter remedy is time consuming and costly. The resale value of the debtor's goods will often be very low so that execution and sale will provide insufficient money to pay the debt. In addition, most debtors will have little property above the statutory exemptions. In contrast, wage garnishment provides access to an asset of "real value". It is in consequence a moderately effective method of recovering a debt.

(2) The judgment creditor has a right to be paid his debt. The law should not therefore deny him this effective remedy which may be the only practical means of recovering on a judgment.

(3) Abolition of wage garnishment might lead creditors to use other remedies more harshly or excessively.

(4) It is argued that wage garnishment is a necessary protection for firms lending money or doing business on credit and that abolition would restrict their ability to do business. For example, the argument is often made that the abolition of wage garnishment may restrict the granting of consumer credit to a high risk borrower, driving him into the illegal money market where the baseball bat replaces the writ of seizure.

(5) The debtor will not be unduly injured by wage garnishment since the exemptions will leave him with sufficient income to survive in society.

(6) Abolition of wage garnishment would treat unfairly a person with a small salary and a number of capital assets compared to a person with a large salary and no assets.[362]

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[362] Exemptions Working Paper, pp. 45-47.

6.226 Before going on to the case for abolition, one point should be made. Insofar as the case for retention stands on the assumption that the price of goods sold by the sheriff is "very low," readers are reminded that this assumption has been challenged by those most closely associated with the process: the sheriffs themselves.[363] However it is true that garnishment of any debt, including wages, produces money directly and without the need for a sale. In that sense, garnishment is clearly a superior remedy to execution.

6.227 The arguments for abolition of wage garnishment were summarized in our 1978 paper as follows:

> (1) For most individuals the wage packet is the principal source of income to meet current expenses. Even allowing creditors a small slice of that amount involves a hardship for the debtor. American data show that the average wage earner requires 85% to 95% of his income simply to meet current expenses. Wage garnishment will often encourage the low income earner to accept welfare since the difference between the public welfare benefits and the allowable exemption from garnishment will be so small that it will not be worthwhile to work for the difference.
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> (2) Wage garnishment may force the overburdened debtor into bankruptcy. Empirical evidence suggests that there is a significant relationship between harsh garnishment laws and personal bankruptcies. Bankruptcy carries a stigma which will affect the debtor's credit rating, his future employment prospects, and his general reputation. If the debtor was not garnisheed he might be able to attempt an orderly payment of his bills over a period of time. Garnishment by one creditor may therefore force the debtor to default on his credit obligations generally. This conclusion leads to another argument.
>
> (3) Garnishment favours the individual aggres-

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[363] Supra, para. 2.103.

sive creditor at the expense of other creditors. The aggressive creditor who garnishees the wages of a debtor may recover all or part of the debt. However, it is probable that as a consequence of the garnishment, the debtor may lose his employment or go bankrupt and therefore be unable to pay his other creditors. Garnishment therefore prevents an orderly payment of debts to all creditors by favouring the creditor who is the first to get in with a garnishment order.

(4) Loss of employment by the debtor was mentioned in the introduction as a major effect of wage garnishment. Employers, particularly small concerns, may find the administration of a garnishment order time consuming and costly. In addition, they may view an employee who is being garnisheed as unreliable and perhaps untrustworthy. The employer may therefore wish to dismiss him. [The equivalent to section 102 of the Employment Standards Act[364] was discussed and thought to be ineffective.[365]]

(5) One of the most trenchant criticisms of wage garnishment is that it is often used as a threat by a creditor. The threat may take the form of pointing out some of the above noted unfortunate consequences of garnishment. Under this threat the debtor may be induced to enter into an onerous repayment schedule or it may precipitate him to leave his job, go into bankruptcy, or take some similarly unwise action.

(6) It is argued that wage garnishment is used most extensively by high risk lenders who count on using their remedies against the low income borrowers to whom they usually lend. It has been shown that this group of borrowers are least able to protect themselves against the arbitrary quality of much consumer adjudication. They are also the most likely group to lose their jobs as a consequence of wage garnishment, and to suffer the upset and distress associated with the remedy. It should be reiterated that many of these debtors are unable, not unwilling, to repay their debts.

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[364] R.S.A. 1980, c. E-10.1.

[365] The section prohibits an employer from dismissing an employee "for the sole reason that garnishment proceedings are being or may be taken against an employee."

> Wage garnishment therefore compounds the despair of life at the bottom of society.[366]

6.228 We have reviewed these arguments with care and have concluded that wage garnishment should be retained as a remedy for unsecured judgment creditors.[367] In addition to preferring the retentionist reasons set out above, we are persuaded by the following:

(1) We earlier proposed that all assets and debts of the debtor should be exigible or attachable by the creditor, unless there is some good reason for coming to the opposite conclusion.[368] The onus is on the abolitionist to show that income payments should be exempted totally from this general policy.

(2) Garnishment of debts, including income, is clearly a more efficient and a cheaper remedy than execution.[369] It takes money directly from the debtor, rather than seizing property which must then be converted into cash at some cost. For most of the population, debts will be repaid out of future income rather than by selling off one's personal or real property, often at a loss; wage garnishment achieves this result directly.

(3) There can be no doubt that attachment of wages would be intolerable without an adequate exemptions policy. In our 1978

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[366] Exemptions Working Paper, pp. 47-51.

[367] As to pre-judgment garnishment of income, see supra, para. 6.69(4).

[368] Supra, paras. 6.31-6.34.

[369] Parker, pp. 94-95; Ramsay Report, pp. 118-20; Scot. R.R. #8, pp. 3, 38.

working paper and earlier in this report,[370] we invited comment on an appropriate exemptions policy. We repeat that invitation here.

(4) Many of the abolitionist arguments turn on weaknesses in the legislation governing debt collection practices or prohibiting dismissal of employees because of wage garnishment. We have already reported on debt collection practices.[371] As to the dismissal of employees, we sought advice in our 1978 working paper[372] on the predecessor to section 102 of the Employment Standards Act.[373] We feel that these problems can be addressed without going to the length of abolishing wage garnishment itself.

(5) We have already expressed some sympathy for the employers who have to respond to wage garnishees.[374] We think that the law should be simplified so that employers can discharge their duties under the garnishee summons with a minimum of cost and trouble. We invite comment on how this goal may be achieved.

(6) We are impressed by the unanimity with which researchers on wage garnishment have concluded that, while the remedy may need improvement, it is essential for the judgment creditor and

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[370] Supra, para. 6.33. See also Ont. L.R.C. Report, vol. 2, pp. 162-87.

[371] Debt Collection Practices: Report No. 42 (1984).

[372] At pp. 68-69.

[373] R.S.A. 1980, c. E-10.1.

[374] Supra, paras. 2.137-2.139. See also Ramsay Report, pp. 243-66.

must be retained[375] (or created in those jurisdictions where it did not exist.)[376]

(4) A Continuing Garnishee Order

6.229 As the law presently stands, the only debt that can be attached is one which is due or accruing due. As a result, there are many payments made on a periodic basis where none of the future payments can be attached because they are neither due nor accruing due. The best example is future income. We described the situation earlier in this report:

> The major difficulty with wages or salary garnishment under the Alberta Rules of Court is that a new summons must be issued and served on the employer for each pay period, as close to the end of the period as possible. Income to be earned in future months is not a debt accruing due, unless the contract of employment specifically provides for payment for future pay periods, whether the employee works or not. The result is that the creditor is forced to deluge the employer with bi-weekly or monthly garnishee summonses, to each of which the employer must respond. The Dunlop empirical study found a substantial number of judgments enforced by more than one wage garnishee, and most of these cases involved garnishees issued against the same employer.[377]

6.230 While the problem arises most commonly with the attachment of future income payments, it can occur in other situations, such as rent, payments on an agreement for sale of land and future payments due on a promissory note.[378] In these cases, the "debts due or accruing due" formula requires the issue and service of a new garnishee summons at every due date. The result is increased cost and trouble for all concerned.

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[375] See Kelly, pp. 13-15, 79-88; Aust. L.R.C., Discussion Paper No. 6, pp. 26-29; Ont. L.R.C. Report, vol. 2, pp. 153-62; Whitford, pp. 1129-35, 1143; Ramsay Proposals, part III, pp. 1-2.

[376] Payne Committee, pp. 86, 89-90, 149-56; Dore & Kerr, pp. 259-75.

[377] *Supra*, para. 2.136.

6.231 In the case of income payments, the proposal has often been made to create a continuing garnishee summons which would catch present and future payments for a fixed period, say, three months, or until the judgment debt is fully paid.[379] The Domestic Relations Act provided for a continuing garnishee summons for disputes litigated under that statute,[380] and the Maintenance Enforcement Act continues that remedy and makes it available against any future payments, whether wages or salary or not.[381] Other jurisdictions[382] have extended the continuing attachment remedy to creditors generally. A private member's bill introduced into the Second Session of the 20th Legislature of Alberta[383] was intended to achieve this result, but the bill was not passed.

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[378] Dunlop Book, pp. 241-43. As to promissory notes, compare Geva, "Execution Against Negotiable Instruments," in Springman and Gertner, eds., Debtor-Creditor Law: Practice and Doctrine (1985), p. 81.

[379] See Payne Committee, pp. 156-60; Scot. Memo. 47, pp. 13-14, 36-38; Scot. Memo. 49, pp. 1-14; Aust. L.R.C., Discussion Paper No. 6, p. 28; Tearle, p. 269; Trebilcock & Shulman, pp. 459-60; Whitford, pp. 1132-33; Law Reform Commission of B.C., Report on Attachment of Debts Act (1978), pp. 35-39, 47-48; Ont. L.R.C. Report, vol. 2, pp. 150-53; Ramsay Proposals, pp. 2-3.

[380] R.S.A. 1980, c. D-37, s. 29.

[381] S.A. 1985, c. M-0.5, ss. 13-13.1.

[382] E.g., England, Nova Scotia, Prince Edward Island and the Yukon Territory.

[383] An Act to Amend the Execution Creditors Act, 1984 (Alta.), Bill 253.

6.232 We have come to the view that a continuing garnishee order for future income and non-income payments is a useful reform, and we tentatively recommend it. We seek advice on how this result can be achieved, given our earlier proposal for an omnibus E.O. and our question about whether the sheriff should have to seize such payments or whether he or she should simply issue a garnishee summons as the clerk does now.[384] If the latter view is accepted, the sheriff could simply be instructed to issue a continuing garnishment order. We are also interested in feedback on the following issues:

(1) Should the continuing order issue for a limited period or until the judgment is fully satisfied?[385]

(2) Should the continuing order issue as of right, or should a judge's order be required?[386]

(3) What other limits should be placed on the remedy?

o. Distribution of the Proceeds of Enforcement

(1) Principles upon which Distribution Should be Made

6.233 The principle upon which the Execution Creditors Act[387] is based is that the proceeds of execution, attachment, garnishment and equitable execution should be shared pro rata by all creditors who file and maintain writs of execution in the sheriff's office. (We will call this "the sharing principle".)

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[384] Supra, paras. 6.215-6.223.

[385] See Scot. Memo. 49, pp. 14-22.

[386] See Law Reform Commission of B.C., Report on Attachment of Debts Act (1978), pp. 37-39.

[387] R.S.A. 1980, c. E-14.

The principle upon which the common law was based was that the proceeds of execution should be paid to writ-holders in order of priority of the writs, based on their respective times of delivery to the sheriff. (We will call this "the priority principle".)

6.234 While other principles could be devised to act as a basis for the distribution of proceeds, we think that one or other of these two should be adopted. The principal question is: which one? Several considerations bear upon the answer.

6.235 The first point to note is that, as we have pointed out in paragraph 2.165, the reason for the enactment of provincial statutes providing for the sharing of proceeds was that the federal insolvency legislation had been repealed and there was therefore no legislation which provided for the orderly realization of an insolvent's assets and for the distribution of the proceeds among creditors. The original reason for the enactment of the provincial statutes no longer exists because, since 1919, the Bankruptcy Act has provided for such realisation and distribution.

6.236 The next point to note is that a requirement of sharing is not a necessary characteristic of a common law legal system. Common law jurisdictions other than the Canadian provinces do not require the sharing of proceeds and have not shown any disposition to adopt such a requirement.

6.237 A third point to note is that in recent years two provincial law reform commissions have considered whether the law of their respective provinces should continue to be based upon the sharing principle. The Ontario Law Reform Commission[388] thought that the law of Ontario should. The British Columbia Law Reform Commission thought that the law of British Columbia should not, but that a system should be created under which judgment creditors could find out about seizures and attachments against their debtors and be given an adequate opportunity to obtain the right to share in the proceeds by petitioning into bankruptcy the debtors against whom the seizures and attachments were made.[389]

6.238 If the original reason for the requirement of sharing has disappeared, and if other legal systems function without it, it is necessary to consider arguments about the merits of the sharing principle and the priority principle.

6.239 First, there is the question of fairness and justice among unsecured creditors. Arguments based on fairness and justice can be made for each principle.

6.240 The priority principle tends to reward activity. The active creditor is likely to effect the first seizure or attachment and thus is more likely to obtain payment of the claim (though chance may have much to do with which creditor obtains judgment first). The priority principle rewards diligence. On the other hand, it also rewards harsh and predatory conduct.

6.241 The sharing principle requires that the rewards of activity be shared. On the one hand, it does not penalize a civilized creditor who is prepared to give a debtor time to pay, as does the priority principle. On the other hand, it rewards the parasitic behaviour of a passive creditor who sits back and takes advantage of the efforts of the active ones. Under the present law, this is particularly significant because the active creditor must lay out his or her own money to effect collection: if the collection efforts are successful the creditor cannot recover more than out-of-pocket costs and if they are unsuccessful he or she cannot require other creditors to contribute to the costs.

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[388] Ont. L.R.C. Report, vol. 5, pp. 1-82.

[389] L.R.C.B.C., Creditors' Relief Legislation: A New Approach (1979).

6.242 It should be noted that the sharing principle does not necessarily preclude the adoption of a system of contribution towards unrecovered costs. One possible system would be to allow an execution creditor who wants to take collection proceedings to require others who wish to share to agree to contribute to the cost. This does not seem to us to be a practical suggestion. It would also be possible to provide that a creditor who files a writ of execution with the sheriff is taken to have authorized the sheriff to take active enforcement steps and to have agreed to pay the creditor's pro rata share of the costs incurred in the course of collection attempts which are reasonable but which prove unsuccessful. Is there some way to maintain the sharing principle while doing greater equity to the active creditor? We invite comment.

6.243 Another question which should be raised is: how would the adoption of each of the two principles affect the conduct of creditors?

6.244 The present system of sharing may encourage a creditor to obtain a default judgment, issue a writ of execution and file it with the sheriff in the hope that these relatively inexpensive steps will enable the creditor to share in the fruits of execution or garnishment carried out at another creditor's expense. The adoption of the priority principle might encourage a creditor to sue more quickly in order to be the first to take enforcement proceedings, but it would be likely to discourage a creditor from suing at all except in a case in which it appears likely that the creditor or the sheriff will be able to find property or money of the debtor to seize or attach.

6.245 Once a creditor has obtained a judgment, the adoption of the priority principle would encourage him or her to try to have property or money seized or attached as soon as possible in order to obtain priority over other creditors. Such action would not be necessary unless it appeared that there was a reasonable chance of collection, but the creditor would probably have gone to judgment only if collection seemed likely.

6.246 For these reasons, it seems likely that more creditors will obtain judgments and file writs of execution (or enforcement orders) under a system of sharing than under a system of priority, but that those creditors who do take action are more likely to take it quickly and carry it through quickly under a system of priority than under a system of sharing. We invite comment on these propositions.

6.247 The argument can be made that, in the long run, it is likely to be in the interest of debtors to have things brought to a head rather than to leave them to sink deeper into debt. However, it is probable that debtors would usually consider it to be more in their interest to be left alone to work themselves out of their debts. We invite comment upon the question whether and to what extent the interests of debtors should be considered when the choice between the priority and sharing principles is made, and also on the question whether or not it is in the interests of debtors to encourage prompt collection efforts.

6.248 We pause here to mention an argument which is sometimes made, namely, that a system based upon the sharing principle fails to distinguish between a creditor who has acted prudently and responsibly in giving credit to the debtor and a creditor who has acted irresponsibly by lending money to a debtor who is already seriously overextended, probably on harsh terms. We do not see the relevance of this question to the choice between the priority principle and the sharing principle, because neither principle takes into account the merit of the creditor. If anything, the priority principle seems likely to offer the greatest rewards to the predatory creditor who may be expected to act quickly, but this is speculation, and in any event we do not think that the argument is one which needs to be considered.

6.249 Next, it should be noted that giving effect to the sharing principle involves costs which must be borne either by execution creditors or by the province. Sheriffs must maintain an administrative system to cope with the system of sharing. They have to keep a record of subsisting executions. They have to ascertain which of those executions are against a debtor from whom a collection is made. They have to ensure that the money is distributed pro rata among the execution creditors. The priority principle does not require such a complex administrative system. On the other hand, the cost of successive seizures of the same goods is avoided if a seizure is automatically made on behalf of all execution creditors.

6.250 The sharing principle does some of the things that bankruptcy legislation does, and it does so without requiring either the debtor or a creditor to take proceedings in bankruptcy. It can be argued that it is good that such an alternative procedure is available: a creditor will often effectively be unable to take bankruptcy proceedings because of the cost of providing a trustee, and would therefore, in the absence of a sharing procedure, have no remedy vis a vis a creditor who has got a seizure in first. As well, it will often be harsher upon the debtor to be put into bankruptcy than to allow creditors to share in the proceeds of collection under the provincial scheme. However, it can also be argued to the contrary that it is bad that the provincial sharing procedure is available: bankruptcy proceedings provide an orderly procedure for getting in all the debtor's exigible property and distributing it among all creditors, and they give the debtor a fresh start at the end.

6.251 What, then, should be done in view of the existence of strong arguments in favour of each of the two principles? We note, first, that Alberta has for decades maintained legislation based upon the sharing principle, and we think that it is for those who want the principle to be abandoned to make the case for abandonment. We note, second, that in our view an important interest which should be considered in choosing between the priority principle and the sharing principle is the interest of creditors, and our tentative view is that we should not recommend the rejection of the sharing principle for the priority principle unless creditors ask for it. We invite comment from creditors and from others as well.

(2) Application of the Sharing Principle

(a) Present Law

6.252 If it is decided that Alberta law should continue to recognize the sharing principle, to what should the principle apply? Should it apply to money paid to the sheriff before seizure or attachment? Should it apply to payments made directly to the creditor? It is not clear whether it applies to the proceeds of execution against land. Should it? We will discuss these questions.

(b) Payments to the Sheriff before Seizure

6.253 Money paid to the sheriff without a seizure is as much the proceeds of the enforcement system as money so paid after seizure or realized by sale. Our tentative recommendation is that, if the sharing principle is retained, it should apply to money paid to the sheriff at any time when a subsisting enforcement order is filed in the sheriff's office.

(c) Direct Payments to the Creditor

6.254 It can be argued that money paid to a creditor, who has filed an enforcement order with the sheriff and is thus able to use the threat of enforcement proceedings as a lever to coerce a debtor into making a payment on the debt, also constitutes proceeds of the enforcement system and should therefore be shared with all execution creditors. However, such an extension would have undesirable consequences. It would discourage an execution creditor from negotiating a private settlement with a debtor for a lesser amount or for instalment payments. Before knowing the consequences of accepting a settlement, a creditor would have to ascertain what enforcement orders were on file with the sheriff, and, if the present grace period is continued, he would have no way of knowing what writs might come in afterward and share. Such a provision would be difficult to enforce, as creditors who wished to share would have to learn of the payment and be able to prove that it had been made. It is likely that such a provision would cause additional litigation. Even if it is decided that the principle of sharing should be retained, we recommend that it should not be carried so far as to require an execution creditor to share what he or she receives directly from the debtor.

(d) Proceeds of Execution against Land

6.255 Money realized by the sale of land under a writ of execution is as much the proceeds of the enforcement system as is money realized by the sale of chattels. If it is decided to retain the sharing principle, we tentatively recommend that the law be clarified so that the principle will cover the proceeds of execution against land.

(e) Certificate Procedure

6.256 The Execution Creditors Act provides a special procedure under which a creditor who does not have a judgment can, if the claim is not contested, obtain a certificate of judgment ten days after serving an affidavit of debt upon the debtor and sending it to all execution creditors, and upon filing the affidavit and proof of service with the clerk of the Queen's Bench. The time is longer if service is effected outside

Alberta. The certificate procedure is available only if there has been a seizure of goods and chattels, or if an execution against land has been unsatisfied for nine months. The only apparent advantage of this procedure is that the ten day period in which the debtor must file an affidavit of good defence is shorter than the usual period for filing a statement of defence or dispute note. Our impression (upon which we invite comment) is that the procedure is rarely used and is of little use, and our tentative recommendation is that it be abolished.

6.257 The Ontario Law Reform Commission, which recommended the abolition of Ontario's certificate procedure, thought that three classes of non-judgment creditors should be entitled to share in a distribution under the Ontario creditors' relief legislation. The three classes were: non-judgment creditors who have proved their claims in orderly payment of debt proceedings which are later cancelled; non-judgment creditors who are responsible for impeaching a voidable transaction; and creditors who attach property of debtors before judgment. Our tentative view is that the first two classes might be left to obtain judgments. The third involves a complex relationship which we would prefer to leave until we decide both whether we should recommend that the sharing principle be continued and what recommendations we should make about pre-judgment remedies. We would deal with the question at the time of our final report and would consult about it then.

6.258 It may be thought that a non-judgment creditor should have some protection against money realized by that creditor's pre-judgment enforcement proceedings being paid out among the holders of subsisting writs of execution before the non-judgment creditor can obtain judgment. If so, we think that the most efficient way of doing so would be to make some provision which would allow a non-judgment creditor to require the sheriff to hold back the share to which the non-judgment creditor would have been entitled if judgment had already been obtained. The provision could work automatically or it could require a judge's order. Presumably there would have to be a time limit, which could be fairly short so that the creditor would have to be active in pursuing the claim to judgment, but which could be capable of extension by judge's order, so that the creditor would not be defeated simply because the debtor contested the claim. We are not convinced that such a procedure would be desirable, but we invite comment.

(f) The Grace Period

6.259 Under section 10 of the Execution Creditors Act, the date upon which it is determined what execution creditors are entitled to share in money which the sheriff receives is not the date upon which the sheriff receives the money, but a date 14 days later (though under section 13, this provision does not apply to money paid to the sheriff in respect of an execution or attachment without seizure having been made).

6.260 Presumably the 14 day grace period was intended to give creditors a chance to perfect their positions either in the ordinary way or by obtaining certificates of judgment under section 20 of the Act. We invite comment on the question whether, if the sharing principle is continued, the grace period should be allowed, or whether money received by the sheriff should be distributed among those who have subsisting enforcement orders filed with the sheriff on the date of the receipt of the money.

(3) Protection of Creditors under the Priority Principle

6.261 The British Columbia Law Reform Commission recommended that British Columbia abolish that province's counterpart of the Execution Creditors Act and return to the common law system. For the purposes of provincial law, the recommendation would abolish the sharing principle and adopt the priority principle. The Commission did not, however, disapprove the sharing principle. Rather, it thought that the place for it is in federal insolvency legislation. As a corollary to its principal recommendation, it thought that in a case in which an execution creditor effects a seizure, the other judgment creditors of the debtor should be given an adequate opportunity to take proceedings under the Bankruptcy Act which would enable them to share in the proceeds.

6.262 The British Columbia Commission's scheme provided for the establishment of a register of recoveries of money under enforcement proceedings. A creditor could inspect the register and could file a notice in it requiring notice of recoveries from a named debtor. A creditor who had commenced bankruptcy proceedings against a debtor could also file a caveat in the register. The sheriff, clerk of the court or receiver who had recovered money under enforcement proceedings would have to hold the money for 45 days before paying it to the creditor who effected the seizure or attachment, and even then could pay it only if no caveat had been filed. The money would thus be available to the trustee in bankruptcy. The Commission's scheme would, however, apply only to judgments of $2500 or more, and it would apply only to recoveries of $1000 or more except for recoveries effected under some form of continuing attachment.

6.263 If it is decided that the priority principle should be adopted under Alberta law, the question will arise whether special provision should be made to give judgment creditors a reasonable opportunity to invoke the Bankruptcy Act. We have not formed an opinion on that question or on the further question whether, assuming that such an opportunity should be given, the proposal of the British Columbia Law Reform Commission is the way to give it. We invite comment.

p. Instalment Judgments

6.264 In chapter 2,[380] we noted that Alberta courts have a limited jurisdiction to grant instalment judgments pursuant to the Judicature Act[381] and the Seizures Act.[382] We have been told that instalment orders granted under this legislation are rare or non-existent. The creditor is very unlikely to make such an application (for reasons set out in chapter 2) and the debtor may be ignorant of the right to apply or reluctant to exercise the right.

6.265 Other law reform agencies have thought that the instalment judgment should be the preferred remedy against debtors. The principal argument is that a scheme of instalments related to the debtor's ability to pay is more likely to be honoured than a judgment for the whole debt.

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[380] Supra, paras. 2.37-2.43.

[381] R.S.A. 1980, c. J-1, ss. 18(1)(a).

[382] R.S.A. 1980, c. S-11, ss. 29(5)(c) and (d).

6.266 We said earlier that we do not want to impose a compulsory examination of means on all debtors.[383] However we are interested in seeing if the present law of instalment judgments is satisfactory. Should the law be changed to give debtors easier access to a judge or an administrator for the purpose of setting instalments? We invite comment.

q. Consumer Education and Assistance

6.267 While this report will not say much about the subject, the Institute believes that any system of creditor-debtor law should include effective mechanisms for debtor education and assistance. Debtor education should be encouraged, although we recognize that no amount of helpful advice will solve the problem of poverty which bedevils many debtors in our society.

6.268 It is important that the Alberta Department of Consumer and Corporate Affairs continue its present policy of issuing educational booklets regarding consumer protection. Many problems can be avoided or their impact limited by raising the educational level of consumers.

6.269 It is also vital for our society to provide counselling services for debtors already in trouble. At present, the Alberta Department of Consumer and Corporate Affairs offers an extensive advisory service through its Family Financial Counselling Service. The Better Business Bureau also offers assistance to consumers in trouble. We think it important that the Alberta Government continue the useful programs offered by the Family Financial Counselling Service, and that private agencies like the Better Business Bureaux be encouraged to continue their consumer assistance programs.

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[383] Supra, para. 6.146.

CHAPTER 7. SUMMARY OF OUR TENTATIVE RECOMMENDATIONS

a. Introduction

7.1 In this chapter, we set out the tentative conclusions reached in chapter 6 of this report. In inviting comment on these questions, we do not intend in any way to foreclose debate or responses on any aspect of this report which other persons may consider relevant. The following scheme is a check-list and is designed to facilitate a response by any person who wishes to comment on the recommendations, which are grouped under various sub-headings.

b. The Need for a Remedial System

(1) The state should provide a reasonably effective system of collecting debts that are capable of being collected and that are not paid voluntarily. (Paras. 6.4-6.8.)

(2) The Alberta law regarding the remedies of unsecured creditors should be completely rewritten into an integrated and coherent system of rules which will be, so far as possible, comprehensible by laypeople who must use the law as well as by lawyers. To that end, we recommend that the various statutes relevant to unsecured creditors' remedies and the relevant parts of the Alberta Rules of Court should be gathered together into one new statute, which might be called the Enforcement of Money Claims Act. Purely procedural rules should be placed in the Alberta Rules of Court. (Paras. 6.9-6.19.)

c. One Enforcement System for All Courts

(3) As to judgments obtained under Part 4 ("Small Claims Matters") of the Provincial Court Act,[1] we have tentatively concluded that that Court should have no independent enforcement system, but that such judgments should continue to be enforced by the process set out in section 57 of the Act. We seek advice on (i) ways in which the remedial system could be simplified so that it can be used more easily by creditors conducting their own litigation, and (ii) mechanisms to get advice and assistance to such creditors. (Paras. 6.20-6.25.)

(4) Our tentative view is that a plaintiff in a Provincial Court action should not be able to obtain any pre-judgment remedies. (Paras. 6.22, 6.26.)

d. Imprisonment an Inappropriate Remedy

(5) The present Alberta law prohibiting imprisonment for debt as a remedy to enforce money judgments is sound and should continue. We invite comment on the question whether there should be legislation regarding the decision in MacNeil v. MacNeil.[2] (Paras. 6.27-6.30.)

e. Assets and Income Available to Enforcement

(6) Our tentative view is that all assets and income of the debtor should be exigible or attachable by his or her unsecured creditors, unless there is some good reason for coming to a different result. Any defects in the sheriff's or the creditor's

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[1] R.S.A. 1980, c. P-20, ss. 35-73.

[2] (1975), 25 R.F.L. 357 (N.S.C.A.).

power to realize on such assets should be corrected, again unless there is a countervailing policy. (Paras. 6.31-6.34.)

(7) We tentatively propose that property should not be exigible if it is necessary to the survival of the debtor, or to his or her continued ability to work. The Institute invites comments on what other exceptions should exist to the general rule that all assets owned by the debtor should be available to execution or garnishment. (Paras. 6.31-6.34.)

f. Creditor Control of the Enforcement Process

(8) We tentatively recommend that Alberta retain the principle of creditor control of the enforcement of money claims and judgments. We think that the creditor should continue to initiate and pursue recovery remedies, and should choose which remedies to pursue. The cost, delay and paternalism inherent in state-controlled enforcement schemes like those discussed in chapter 5 lead us to reject them for this jurisdiction, except for specialized claims like those against maintenance defaulters. (Paras. 6.35-6.61.)

g. A Pre-Judgment Remedy

(9) We tentatively propose that a plaintiff who is claiming some sort of monetary judgment should, before judgment is obtained, be able in narrowly defined situations to attach property of the defendant in order to ensure that it will be available for execution or attachment once the plaintiff obtains judgment. (Paras. 6.62-6.64.)

(10) We tentatively conclude that the present pre-judgment remedies are in need of reform. We invite comment on the idea that the present remedies available before judgment to a plaintiff claiming monetary relief should be replaced by one new pre-judgment remedy. (Paras. 6.65-6.68.)

(11) We invite comment on the question whether pre-judgment remedies should be available whatever the plaintiff's cause of action or whether the remedy should be available only where certain causes of action are pleaded. ((Para. 6.69(1).)) We seek advice on the question whether the remedy should ever be available before the plaintiff has commenced an action. ((Para. 6.69 (2).))

(12) We tentatively propose that pre-judgment relief should be available only by judge's order. ((Para. 6.69 (3).))

(13) We tentatively propose that the remedy or remedies should be capable of attaching at the discretion of the court all assets of the defendant except those which are exempt from any post-judgment remedy. We invite comment on the question whether pre-judgment remedies should catch wage or salary payments. ((Para. 6.69 (4).))

(14) We invite comment on the appropriate grounds for issue of pre-judgment relief, and on the standard of proof which should be required of the plaintiff. ((Para. 6.69 (5).))

(15) We invite comment on procedural questions, such as notice to the defendant and his or her right to a hearing, the applicant's duty of full disclosure, and the form and effect of the order. ((Para. 6.69 (6)(7).))

(16) We tentatively propose that the law should be amended to make it clear that the writs of ne exeat regno and ne exeat provincia are abolished as processes available to plaintiffs in actions claiming monetary relief. (Paras. 6.70-6.71.)

h. Post-Judgment Remedies--The Interests Involved

(17) We encourage the federal government to enact more extensive and flexible consumer arrangement and bankruptcy provisions. (Paras. 6.91-6.94.)

(18) We urge the provincial government to continue its present participation in Part X of the Bankruptcy Act (Orderly Payment of Debts)[3] and to look favorably on participation in any new federal consumer arrangement and bankruptcy legislation. (Paras. 6.91-6.94.)

i. A New Post-Judgment Remedy

(19) We tentatively recommend that all existing remedies for the enforcement of money judgments should be abolished and replaced by one new remedy, to be called the enforcement order (hereafter E.O.). This new process will be designed to catch all real and personal property of the judgment debtor, including debts owing to him or her. (Paras. 6.95-6.102.)

(20) We tentatively recommend that the E.O. should be available only after judgment. Where a judgment is set aside pursuant to Rule 158, an E.O. granted under that judgment should also be set aside. (Paras. 6.103-6.105.)

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[3] R.S.C. 1970, c. B-3, ss. 188-213.

(21) We tentatively recommend that the E.O. should be issued out of the clerk of the court's office. (Para. 6.106.)

(22) We tentatively recommend that every effort should be made to draft the standard form of the E.O. in language which will be readily understandable. (Para. 6.106.)

(23) We tentatively recommend that an E.O. issued in the clerk's office but not delivered to the sheriff's office should have no binding effect on the judgment debtor's property and should not entitle the judgment creditor to share in distributions under the Execution Creditors Act.[4] (Para. 6.107.)

(24) We tentatively recommend that a judgment creditor who has issued an E.O. may, in his or her discretion, deliver it to the sheriff's office. (Para. 6.107.)

(25) We tentatively recommend that the E.O. should not express itself to be or operate upon its delivery to the sheriff as an immediate instruction to the sheriff to enforce. The creditor should be required to give separate express written instructions to the sheriff to enforce the E.O. ((Para. 6.108(i).))

(26) We tentatively recommend that the holder of an E.O. which is filed in the sheriff's office and kept up to date is entitled to share pari passu in the proceeds of another creditor's execution or garnishment effected in the same judicial district. ((Para. 6.108(ii).)) This recommendation depends on our later discussion of judicial districts and of the Execution Creditors Act.

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[4] R.S.A. 1980, c. E-14.

(27) We tentatively propose that the E.O. should bind personal property of the debtor only from the time of actual seizure of the property. (Paras. 6.109-6.120.)

(28) We tentatively recommend that the Department of the Attorney General should establish a computerized register of E.Os., showing as much information on actions taken under the E.Os. as is feasible. (Paras. 6.121-6.123.)

(29) We tentatively recommend that the E.O., once filed with any sheriff in the province, (i) should be effective to support seizures or other enforcement processes anywhere in the province, and (ii) should be entitled pursuant to the Execution Creditors Act to share in the fruits of an execution or garnishment conducted anywhere in the province.
(Paras. 6.124-6.135.)

(30) We invite comment on the creation of a province-wide sheriff's office and the consequent elimination of limitations based on the boundaries of judicial districts on the powers of the sheriff and on distributions under the Execution Creditors Act. (Paras. 6.124-6.135.)

(31) Once the E.O. is filed with the sheriff, we tentatively recommend that the creditor may at any time during the life of the E.O. instruct the sheriff to enforce it. We invite comment about what documents and promises of security should accompany the creditor's request to enforce.
(Para. 6.136.)

(32) We invite comment on the question of the proper limitations rules to apply to the issue and the duration of the

E.O. (Para. 6.137.)

(33) We invite comment on the present operation of the sheriffs' offices, and on the initial training and continuing education of sheriffs' officers. (Paras. 6.138-6.140.)

j. Information About the Debtor's Assets

(34) We tentatively reject the idea that every judgment debtor should be examined orally by a judicial or administrative officer. (Paras. 6.141-6.145.)

(35) We tentatively recommend that, when a creditor instructs the sheriff to enforce an E.O., the creditor must provide the sheriff, to the best of his or her knowledge, with information concerning the debtor's property in respect of which the enforcement is requested. (Paras. 6.151-6.153.) This proposal must be read subject to our discussion of the sheriff's duty to seize (at paras. 6.157-6.161 of c. 6) and recommendation 38, below.

(36) We invite comment on the idea that, before a creditor can examine a debtor in aid, the creditor must request the sheriff to send to the debtor a written questionnaire to be completed and returned to the sheriff. (Paras. 6.154-6.155.)

(37) We invite comment on ways to improve the examination in aid process. We specifically ask for comment on the use of imprisonment for contempt as a sanction against debtors who fail to appear at examinations or to answer questions. (Para. 6.156.)

K. The Seizure and Sale Process

(38) We tentatively recommend that, where the sheriff has received from the creditor express written instructions to enforce the E.O. and the other documents and promises of security referred to in recommendation 29, and where the sheriff has sufficient information about the debtor to attempt enforcement, the sheriff should be under a statutory duty to commence active enforcment measures against the debtor. (Paras. 6.157-6.161.)

(39) We invite comment on the law regarding seizure of the debtor's property. (Paras. 6.162-6.163.)

(40) When the sheriff is instructed to enforce an E.O. and has carried out the instructions by seizing property or attaching a debt, the sheriff should be required to give or send to the judgment debtor a copy of the E.O. (Para. 6.164.)

(41) When the sheriff delivers the copy of the E.O. to the debtor, he or she should also give or send to the debtor a Notice of Judgment. The Notice should be a relatively simple document, in language comprehensible to laypersons. It should set out the court that issued the judgment being enforced, the style of cause, the date of judgment, the full name and address of the creditor, and the amount of the judgment, including costs, interest and other allowable amounts. The Notice should indicate to the debtor that, subject to the statutory exemptions, all his or her assets are subject to enforcement measures, such as seizure, sale and garnishment. The Notice should also include (1) a warning to the debtor concerning the gravity of the situation and (2) a statement advising the debtor to seek the

advice of a lawyer or the Family Financial Counselling Service. (Paras. 6.165-6.167.)

(42) Assuming that there is no Personal Property Security Act in force in Alberta, we invite comment on the effect of seizure. We particularly seek advice on the sheriff's right to personalty under seizure as against a bona fide purchaser for consideration of the personalty after seizure but without notice of the E.O. or of the seizure. (Paras. 6.168-6.176.)

(43) We tentatively propose that, if a Personal Property Security Act is passed in Alberta, the law should be amended to provide as follows:

(i) Once the sheriff has seized personalty of the debtor, the sheriff or the creditor should file in the personal property security registry a notice of seizure of the personalty.

(ii) Upon seizure of personalty and registration of the notice of seizure in the personal property security registry, the E.O. would bind the seized personalty. We invite comment on the rights of a bona fide purchaser of the seized personalty after seizure and registration in the PPSA. registry of the notice of seizure, and before sale. (Paras. 6.168-6.178.)

(44) We invite comment on the law relating to the sale of seized goods. We are particularly interested in getting feedback on the question of the success of the present sheriff's sale in realizing the true value of seized goods, but opinions on all aspects of the sale process would be welcome. (Paras. 6.179-6.180.)

(45) We invite comment on the idea that the sheriff's powers should be expanded to include powers (i) to realize on property other than by sale and (ii) to retain and manage property for a reasonable time. We specifically ask for comment on two proposals:

(i) the idea that equitable execution should be made available to a judgment creditor where it appears to the court to be a more reasonable and convenient process than the enforcement order, or where the sheriff or receiver needs specific instructions and powers;

(ii) the Ontario proposal of a sheriff-receiver discussed in the body of the report. (Paras. 6.181-6.187.)

1. Execution Against Land

(46) We tentatively recommend that all interests in land of the judgment debtor should be exigible pursuant to an E.O. unless there is some good reason for coming to a different result. We see no reason why unregistered interests in land should not be available to execution, and we so recommend. (Para. 6.193.)

(47) We invite comment on the recommendations on exemptions of land in our 1978 Exemptions Working Paper and on the question of land exemptions generally. (Para. 6.194.)

(48) We tentatively recommend that the binding effect of an E.O. against land should occur when a certified copy of the E.O. is filed at a land titles office. (Para. 6.195.)

(49) We tentatively recommend that mortgagees' interests in land should be proceeded against only pursuant to an E.O. filed

in a land titles office. We invite comment on the question whether leasehold interests should be treated as personalty or realty for the purposes of enforcement. (Paras. 6.196.)

(50) We invite comment on the following questions:

(i) Should execution creditors be required, in order to bind the land of the debtor, to file their E.Os. against the specific parcel? In other words, should the general register be abolished, at least for E.Os?

(ii) If the answer to Question (i) is yes, should that reform be delayed until the creation of an index of land holdings in Alberta by name of owner?

(iii) If the answer to Question (ii) is yes, what changes should be made in the interim to lighten the burden of the E.O. on the conveyancing process?

(iv) What decision should be made as to the geographic scope of the E.O.'s binding effect against land? Should the E.O.'s binding effect be limited to a specific judicial district or extended to the boundaries of a land registration district? Should the E.O. bind land throughout the province?

(v) Do you have any other suggestions relevant to the general register and the binding effect of the E.O.?
(Paras. 6.197-6.203.)

(51) We tentatively recommend that the process of seizure and sale of land under execution should be simplified and clarified. Mortgagees' interests should be seized and sold like other interests in land. We invite comment as to the seizure and

sale of leaseholds. (Para. 6.204.)

(52) We invite comment on the limitations, if any, which should apply to execution against land, including the present subsection 15(1) of the Seizures Act[5] and the idea of a "redemption" period suggested by the British Columbia Law Reform Commission.[6] (Para. 6.205.)

(53) We invite comment on two questions:

(i) Should the judgment creditor who receives full or part satisfaction of the debt be required to communicate that fact to any sheriff's office where an E.O. has been filed?

(ii) Should the judgment creditor be required to communicate the fact of satisfaction to all relevant offices (clerk, sheriff, land titles) where he or she has filed documents? (Paras. 6.206-6.209.)

(54) We tentatively recommend that, when a sheriff's office receives a letter or document to the effect that a judgment debt has been discharged, that fact should in all cases be communicated to both land titles offices which should then withdraw any E.O. filed in support of that debt from the general register and place it in the register of discharged E.Os. (Paras. 6.206-6.209.)

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[5] R.S.A. 1980, c. S-11.

[6] Law Reform Commission of B.C., Report on Execution Against Land (1973), pp. 19-21.

(m) Attachment of Debts

(55) We tentatively recommend that the creditor's request for attachment of debts should be directed to the sheriff instead of the clerk of the court, and that the subsequent performance of the request should involve only the sheriff's office. We invite comment on the process of attachment of debts, including the extent of the sheriff's active participation in the process. (Paras. 6.215-6.222.)

(56) We invite comment on the idea of a process like the removal and sale application but applicable to the attachment of debts. (Para. 6.223.)

(57) We tentatively recommend that wage garnishment should be retained as a remedy for unsecured judgment creditors. We invite comment on an appropriate exemptions policy. (Paras. 6.224-6.228.)

(58) We think that the law of wage garnishment should be simplified so that employers can discharge their duties under the garnishee summons with a minimum of cost and trouble. We invite comment on how this goal may be achieved. (Para. 6.228.)

(59) We tentatively recommend the creation of a continuing attachment of debts order to catch present and future income and non-income payments. We seek advice on how this result can be achieved, given our earlier proposal for an omnibus E.O. and our question about whether the sheriff should have to seize such payments or whether he or she should simply issue a garnishee summons as the clerk does now.[7] We are also interested in

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[7] Supra, recommendation 55.

feedback on the following issues:

(i) Should the continuing order issue for a limited period or until the judgment is fully satisfied?

(ii) Should the continuing order issue as of right, or should a judge's order be required?

(iii) What other limits should be placed on the remedy? (Paras. 6.229-6.232.)

n. Distribution of the Proceeds of Enforcement

(60) In light of the fact that Alberta has for decades maintained an Execution Creditors Act based on the sharing principle, we think that it is for those who want the principle abandoned and the legislation repealed to make the case for change. Our tentative view is that we should not recommend the rejection of the sharing principle for the priority principle unless creditors ask for it. We invite comment from creditors and from others as well. (Paras. 6.233-6.251.)

(61) We invite comments on ways to maintain the sharing principle while doing greater equity to the active creditor. (Para. 6.242.)

(62) We tentatively recommend that, if the sharing principle is retained, it should apply to money paid to the sheriff at any time when a subsisting enforcement order is filed in the sheriff's office. (Para. 6.253.)

(63) Even if the sharing principle is retained, we recommend that it should not be carried so far as to require an

execution creditor to share what he or she receives directly from the debtor. (Para. 6.254.)

(64) If the sharing principle is retained, we tentatively recommend that the law be clarified so that the principle will cover the proceeds of execution against land. (Para. 6.255.)

(65) Our impression (upon which we invite comment) of the certificate procedure in the Execution Creditors Act is that the procedure is rarely used and is of little use. Our tentative recommendation is that the certificate procedure be abolished. (Para. 6.256.)

(66) We invite comment on the idea that, where a non-judgment creditor realizes money by a pre-judgment enforcement proceeding, that creditor's share should be held by the sheriff (either automatically or on court order) for a certain length of time so that the creditor can obtain judgment. (Paras. 6.257-6.258.)

(67) If the sharing principle is continued, we invite comment on the question whether the grace period should be allowed, or whether money received by the sheriff should be distributed among those who have subsisting enforcement orders filed with the sheriff on the date of the receipt of the money. (Paras. 6.259-6.260.)

(68) If it is decided that the priority principle should be adopted under Alberta law, the question will arise whether special provision should be made to give judgment creditors a reasonable opportunity to invoke the Bankruptcy Act. We have not formed an opinion on that question or on the further question

whether, assuming that such an opportunity should be given, the proposal of the British Columbia Law Reform Commission is the way to give it. We invite comment. (Paras. 6.261-6.263.)

o. Instalment Judgments

(69) We invite comment on the present law of instalment judgments, especially on the question whether the law should be changed to give debtors easier access to a judge or an administrator for the purpose of setting instalments. (Paras. 6.264-6.266.)

p. Consumer Education and Assistance

(70) Any system of creditor-debtor law should include effective mechanisms for debtor education and assistance. The Institute urges the Alberta Department of Consumer and Corporate Affairs to (i) continue its present policy of issuing educational booklets regarding consumer protection, (ii) continue the useful services offered by the Family Financial Counselling Service, (iii) encourage private agencies like the Better Business Bureaux to continue their consumer assistance programs. (Paras. 6.267-6.26S.)